SUPREME COURT OF THE UNITED STATES.

No. ~~175~~. 80.

THE MARINE BANK OF CHICAGO, PLAINTIFF IN ERROR

vs.

THE BROADWAY BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 193.

THE MARINE BANK OF CHICAGO, PLAINTIFF IN ERROR,

vs.

THE BROADWAY BANK.

ROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Pleas	1	1
Summons	4	2
Declaration	6	3
Verdict	17	8
Judgment	19	9
Bill of exceptions	20	9
Appeal bond	46	23
Copy of writ of error	48	24
Copy of citation and service	50	25
Clerk's certificate	52	25
Errors assigned	53	26

1 Pleas in the circuit court of the United States for the northern district of Illinois, before the Hon. Thomas Drummond, judge of the district court for said district, and on Saturday, the fourteenth day of December, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth year.

WM. H. BRADLEY, *Cl'k.*

BROADWAY BANK
v.
MARINE BANK OF CHICAGO. } Assumpsit.

Be it remembered that on the sixteenth day of September, in the year of our Lord one thousand eight hundred and sixty-one, said plaintiff, by E. S. Smith, its attorney, came into the clerk's office of the circuit court of the United States for the northern dis-
2 trict of Illinois, and filed his precipe for summons and bond for costs, in the words and figures following, to wit:

Precipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1861.

BROADWAY BANK, plaintiff,
v.
MARINE BANK OF CHICAGO, defendant. } Assumpsit. Damages $6,000.

You will please issue summons in the above-entitled cause in favor of the above-named plaintiff, who is a citizen of the State of New York, against the above-named defendant, who is a citizen of the State of Illinois, and make the same returnable to said court on the first Monday of October, A. D. 1861.

Dated the 16th day Sept., A. D. 1861.

Yours, &c.,
E. S. SMITH, *Pl'ff's Att.*

To WILLIAM H. BRADLEY, Esq.,
The Clerk of said Court.

3 Endorsed: Filed Sept. 16, 1861.

WM. H. BRADLEY, *Cl'k.*

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1861.

BROADWAY BANK
v.
MARINE BANK OF CHICAGO.

I hereby enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against his property for any costs taxed against him.

Dated this 16th day of September, A. D. 1861.

E. S. SMITH.

Endorsed: Filed Sept. 16, 1861.

WM. H. BRADLEY, *Clerk.*

4 And thereupon a summons issued against said defendant, as follows, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Marine Bank of Chicago, if it shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the October term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Broadway Bank in a plea of trespass on the case, upon promises, to its damage, as it alleges, of six thousand dollars. And have you then and there this writ.

Witness the Hon. Roger B. Taney, chief justice of the Su-
5 preme Court of the United States of America, at Chicago aforesaid, this 16th day of September, in the year of our Lord
[L. S.] one thousand eight hundred and sixty-one, and of our independence the 86th year.

WM. H. BRADLEY, *Clerk.*

Marshal's return endorsed thereon: I have, this 19th day of September, A. D. 1861, served the within writ, by leaving a copy of the

same in the hands of J. Young Scammon, president of the within-named Marine Bank of Chicago.

J. R. JONES,
U. S. Marshal. Nor. Dist. of Illinois,
By GEO. L. WEBB, *Deputy.*

Endorsed: Filed Sept. 27, 1861.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 16th day of September, A. D. 1861, the said plaintiff, by E. S. Smith, its attorney, came and filed in the clerk's office aforesaid, its declaration against the defendant in the words and figures following, to wit:

6 *Declaration.*

UNITED STATES OF AMERICA,
Circuit Court of the U. S., Northern District of Illinois, ss:

Of the October term, A. D. 1861.

BROADWAY BANK
vs.
MARINE BANK OF CHICAGO.

Broadway Bank, residing and doing business in the city of New York, and a citizen of the State of New York, plaintiff in this suit, by E. S. Smith, attorney, comes and complains of the Marine Bank of Chicago, which is resident and doing business in the city of Chicago, in said district, and is a citizen of the State of Illinois, in a plea of trespass on the case upon promises.

For that, whereas, at the time and times hereinafter mentioned, the defendant was, and still is, a corporation duly organized and established under the laws of the State of Illinois; and the plaintiff was also, and still is, a corporation established and organized in like manner under the laws of the State of New York.

That heretofore, to wit, on the 21st day of April, A. D. 1861, at Chicago, in said State, the defendant collected, and received for the plaintiffs, large sums of money of divers persons, that is to
7 say, of L. A. & D. M. Halbert, the sum of thirteen hundred and eighty-seven dollars and twenty-nine cents; of C. L. Hoyt, the sum of six hundred and seventy dollars and fifty-four cents; of Wm. Smith & Co., four hundred and ninety dollars and sixty-four cents; of Butler & Weed, six hundred and seventy-one dollars; of O. B. Biswell, one hundred and thirty-five dollars and eighty-eight cents; of J. Stevenson, three hundred and twenty-seven dollars and seventy-two cents; of Ira Wilson, one thousand and seventy-one dollars and twenty-two cents; amounting in the aggregate to the sum of three thousand eight hundred and fifty-four dollars and thirty-four cents, which said sum was collected by the defendants upon drafts and notes, and bills of exchange, for the plaintiff, and was had and received by the defendant to the plaintiff's use.

For that whereas the said defendant, heretofore, to wit, on the 21st day of April, in the year of our Lord one thousand eight hundred and 61, at Chicago, to wit, at Chicago, in the county aforesaid, was indebted to the said plaintiff in the sum of six thousand dollars and cents, of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

3

And whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay unto the said plaintiff so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth, when the said defendant should be thereunto afterwards requested; and the said plaintiff aver that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of six thousand dollars of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of six thousand dollars of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and also in the further sum of six thousand dollars for so much money before that time and then due and payable from the said defendant to the said plaintiff, for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiff, and by the said plaintiff foreborne to the said defendant for divers long spaces of time, before then elapsed, at the like special instance and request of the said defendant. And being so indebted the said defendant, in consideration thereof, afterwards, to wit on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto

9

the said plaintiff the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money, before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendant then
10 and there was found to be in arrear and indebted to the said plaintiff in the further sum of six thousand dollars of the like lawful money, as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff, the said defendant has hitherto altogether refused, and still do refuse, to the damage of the said plaintiff six thousand dollars; and therefore the said plaintiff bring suit, &c.

E. S. SMITH, *Pl'ff's Att'y.*

Copy of account sued upon.

Marine Bank of Chicago to Broadway Bank, Dr.

To m'y had and received	$6,000
" m'y lent and advanced	6,000

Endorsed: Filed Sept. 16, 1861.

W. H. BRADLEY, *Cl'k.*

11 And afterwards, to wit, on the 10th day of October, A. D. 1861, the said defendants, by its attorneys, came and filed their plea and notice in the words and figures following, to wit:

Plea and notice.

Circuit court of the United States for the northern district of Illinois.
Of the October term, A. D. 1861.

THE MARINE BANK OF CHICAGO *ads.* THE BROADWAY BANK. } Assumpsit.

And now come the said defendants, by McCagg & Fuller, their attorneys, and defend the wrong and injury, when, &c., and say that

it did not undertake and promise in manner and form as the said plaintiffs have above thereof complained against it, and of this the said defendants put themselves upon the country, &c.

FULLER & McCAGG,
Def'ts' Att'ys.
BECKWITH & HOYNE,
Counsel.

To E. S. SMITH, *Pl'ff's Att'y:*

You will please to take notice that we shall insist upon and give in evidence under the general issue upon the trial of the above-entitled cause, that at the said time, when, &c., when said cause of action accrued as alleged in the said plaintiffs' declaration, the said defendants had been and were acting as the bankers of said plaintiffs in Chicago, and as their special agents in that behalf had collected for them, and upon their account, at their special instance and request, a large amount of depreciated and non-specie-paying bank notes passing current in said northern district of Illinois, as and in lieu of money, to wit, the notes of sundry and divers banks organized and created under and by virtue of the laws of Illinois, commonly known and called "Illinois currency," and had received the same on deposit of or in payment of debts due said plaintiffs, which is the same identical indebtedness or funds claimed in the said plaintiffs' declaration to be due them, as money had and received by said defendants and not otherwise. And the said defendants aver, that said indebtedness claimed, in said plaintiffs' declaration, arose out of the collection or receipt, by said defendants upon account of said
13 plaintiffs, of a large amount of said depreciated bank notes passing in lieu of money, at the request of, and by agreement with, plaintiffs, in payment of sundry demands or accounts remitted for collection to said defendants, at Chicago, in said district, or upon deposit, payable to order of said plaintiff, and which bank notes are the same identical money claimed to be due, as money, from said defendants to said plaintiffs, and not otherwise; of all which said plaintiffs had notice.

And the said defendants will also insist upon and give in evidence that the said indebtedness of said defendants, if any there be, arises out of divers and sundry collections made by defendants, at the instance and request of said plaintiffs, and as the agent of said plaintiffs, of large amounts of Illinois bank notes, commonly called "Illinois currency," consisting of the bank notes issued by divers and sundry banks organized and created under and by virtue of the laws of Illinois, and which were passing as, and in lieu of, money, but at a value greatly depreciated below that of money or gold and
14 silver coin; that at the time when said notes were received or funds collected, it had been and was a general custom and usage in Chicago, in said northern district of Illinois, among all banks, bankers, and other persons, to receive and pay out, as currency, in payment of all debts and general transactions of business, the notes of all Illinois banks organized under and by virtue of the laws of Illi-

nois, as, and in lieu of, money, of which custom and usage the plaintiffs had notice, and that the said defendants, as such bankers and agents of said plaintiffs, had always thence hitherto received in payment of all debts, transactions of business, and collections, the notes of all banks organized under and by virtue of the laws of said State of Illinois, which had been issued or circulated as, and in lieu of, money, although the defendants aver that it was well known, understood, and agreed by and between the said plaintiffs and defendants, that such bank notes, otherwise sometime called and known as "Illinois currency," was depreciated in value, and of greatly less value than money, specie, gold or silver coin, and that said paper or bank-notes were received as current funds the same as if they were or had been intrinsically worth the nominal or pretended value expressed upon their face in dollars; and so the defendants will insist that if liable to said plaintiffs, they are only liable as by their special agreement and undertaking aforesaid, as agents aforesaid, for the true value of the amount of said bank-notes or currency collected or received of, or upon account of said plaintiffs, and not the same or nominal amount specified as money claimed to have been had and received by said defendants as aforesaid, in currency as aforesaid, to the use, &c., of said plaintiffs, nor of that amount of money paid or lent to said defendants by said plaintiffs, nor as for that sum of money collected, and which are the same causes of action and none other specified in said plaintiffs' declaration, which defendants will insist upon and are ready to verify, &c.

McCAGG & FULLER, *Def'ts' Att'ys.*
BECKWITH & HOYNE, *Counsel.*

15½ Endorsed: Filed Oct. 10, 1861.
WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 12th day of November, A. D. 1861, in the record of the proceedings of said court in said cause is the following entry, to wit:

BROADWAY BANK
v.
MARINE BANK OF CHICAGO. } Assumpsit.

Now comes the defendant by her attorney, and on motion leave is given to cross-examine M. Ward, whose deposition *de bene esse* has been taken and filed in this cause on the part of the plaintiff.

And afterwards, to wit, on the 3d day of December, A. D. 1861, in the record of the proceedings of said court in said cause is the following entry, to wit:

16 BROADWAY BANK
v.
MARINE BANK OF CHICAGO. } Assumpsit.

Now comes the parties by their attorneys, and upon issue joined, come a jury of good and lawful men, to wit, Michael Burns, John

Paul, Thomas Speer, Elias Benner, O. M. Brewster, David Bloom, John I. Buckley, E. B. Kingsby, William Moore, A. S. Telford, P. Jacobs, and Jacob Patman, who are all duly elected, tried, and sworn to well and truly try the issue joined; after hearing the evidence and a part of the argument of counsel, the hour of adjournment having arrived, the further argument of counsel is postponed until to-morrow morning.

And afterwards, to wit, on the 4th day of December, A. D. 1861, in the record of the proceedings of said court in said cause is the following entry, to wit:

BROADWAY BANK
v.
MARINE BANK OF CHICAGO. } Assumpsit.

17 Now come again the parties by their attorneys, and come the jury in this behalf empannelled and sworn, and after hearing the conclusion of the arguments of counsel and the instructions of the court, retire to consider of their verdict, and after a short absence return into court the following verdict: We, the jury, find the issue for the plaintiff, and assess the damages at the sum of thirty-six hundred and fifty-two dollars and eighty-one cents.

And afterwards, to wit, on the 13th day of December, A. D. 1861, in the record of the proceedings of said court in said cause is the following entry, to wit:

BROADWAY BANK
v.
MARINE BANK OF CHICAGO. } Assumpsit.

Now come the parties by their attorneys, and thereupon comes on to be heard the motion of the defendants for a new trial, and after argument of counsel the court takes said motion under advisement.

18 And afterwards, to wit, on the 14th day of December, A. D. 1861, in the record of the proceedings of said court in said cause is the following entry, to wit:

BROADWAY BANK
v.
MARINE BANK OF CHICAGO. } Assumpsit.

The court having fully considered and being now sufficiently advised upon the motion of the defendant heretofore made for a new trial of this cause, and having intimated an opinion on said motion, the plaintiff thereupon enters a remittitur for the sum of five hundred and five dollars and thirty-seven cents, being the money collected on the J. Stedman note, for three hundred and twenty-seven dollars and seventy-two cents, and J. Wilson, for one hundred and seventy-one dollars and twenty-two cents, with interest from September sixteenth last to the date of the verdict, to wit: the fourth day of December instant, as declared on by plaintiff; and by leave of the court, the plaintiff, by its attorney, withdraws from this suit the said two claims of J. Stedman and J. Wilson.

19 And thereupon the court overrules the motion of the defendant for a new trial, and awards judgment on the finding of the jury, less the above remittitur.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of and from the said defendant the said sum of three thousand one hundred and fifty-seven dollars and forty-four cents, being the amount of the verdict found by the jury, less the remittitur above entered, and that the plaintiff do have and recover of the defendant the costs and charges herein, amounting to the sum of forty-four dollars and fifty-six cents, and that execution issue therefor.

And thereupon the said defendant, to wit, on the 14th day of December, A. D. 1861, came and filed its bill of exceptions in the words and figures following, to wit:

20 In the United States circuit court, northern district of Illinois.

THE BROADWAY BANK
vs.
THE MARINE BANK OF CHICAGO.

Bill of exceptions.

Be it remembered, that on the trial of this cause the plaintiff offered and read in evidence the following letters from the plaintiff to the defendants:

Copy A.

BROADWAY BANK,
New York, May 16th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

J. Steveson,	May 28	$327 72	and exc.
E. P. Martin & Hersey,	29	790 40	and ex.
H. Slater & Co.,	29	230	and ex.
Wm. F. Stewarts,	30	275	and exc.

Please return note of J. A. Cogswell, $619 14 and ex., due 23d, at Fulton, Ills.

21 Copy B.

BROADWAY BANK,
New York, May 25th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please colllect for our account—

Wheat & Shaw,	June 13	$50	53 and ex.
J. Stedman,	9	165	50 and exc.
Carter & Osborn,	11	338	74 and ex.
Ira Wilson,	7	171	22 and ex.
E. J. Hachley,	9	697	61 and ex.

Collect in specie or its equivalent, or protest and return.

Copy C.

BROADWAY BANK,
New York, April 8th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

B. W. Gray,	Ap'l 21	$550		and exc. less ½ p. c.
M. Prescott,	23	283	55	and exc.
T. S. Gordon,	21	570		and exc.
L. A. & D. M. Halber,	21	1,321	23	and exc.
F. Siraunell,	23	1,090	66	and exc.
22 A. P. Bartlett,	28	1,060		and exc.
Neil Donnelly,	24	520		and exc.

Copy D.

BROADWAY BANK,
New York, April 15th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

J. N. Hough,	May 9	$1,957	21	and exc.
F. Goldman,	Ap'l 26	158	06	and exc.
a inerd & B.,	28	219	73	and exc., over ½
R. Thompson & Co.,	29	92	43	and exc.
E. F. Pengut,	30	139	28	and exc.
W. Little & Co.,	30	1,126	07	and exc.
A. Switzer,	26	236	48	and exc.
Flagg & Barr,	27	313	97	and exc.
C. L. Hoyt,	28	609	58	and exc.
Jno. Barnard,	28	274	51	and exc.
E. H. Callicott,	28	341	56	and exc.

C. Buhl, A'pl 30 ..... $662 and exc.
W. F. Stewart, 30 ..... 268 40 and exc.
H. A. Tucker & Co. 11 50

Copy E.

BROADWAY BANK,
New York, April 29th, 1861.

H. B. DOX, Esq., *Cashier:*

23 DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

Wm. Smith & Co., May 13 ..... $446 09 and exc.
Butler & Weed, 15 ..... 610 and exc.

Please return note of W. H. Taylor, $100, due May 7th, at Chicago.

Copy F.

BROADWAY BANK,
New York, May 4th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

Ashabel Gridley, June 26 ..... $272 70 and exc.
Theo. Goldman, May 19, (taken out.)
Clegg & Baker, 20 ..... 204 25 and exc.
J. H. Cogswell, 23 ..... 619 14 and exc.
O. P. Bissell, 15 ..... 121 88 and exc.

Note of Butler & Weed, $610, due 15th, will you please have it presented at the office of Butler & Hunt, 48 State st., if not paid at Geo. Smith & Co's, where it is made payable.

24 Copy G.

BROADWAY BANK,
New York, May 18th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

R. D. Smith,	St	$277 87	and ½ exc.
Grover Ayers,	June 1	221 87	and exc.
Henry Root & Co.,	2	616 94	and exc.
J. J. Tower,	4	130	and exc.

I have received advice of payments of the following notes, with exch'ge, but not the remittances. Have you remitted for them? I have received remittances for other items due after these.

D. A. & D. M. Halbert, Ottawa, $1,321 23, due Ap'l 21.
C. L. Hoyt, Aurora, 609 58, due Ap'l 28.

The plaintiff then read in evidence the following letters from the defendant to the plaintiff:

MARINE BANK,
Chicago, Apr. 25, 1861.

J. L. EVERITT, Esq., *Cas.:*

Your account has credit this day as follows.
Respectfully, yours,
B. F. CARVER, *Cashier.*

25 L. A. & D. M. Halbert $1,321 23
and Pr. & C 66 06

Cash. 1,387 29
Exhibit A.

R. E. S., *U. S. Com'r.*

MARINE BANK,
Chicago, Ap'l 30, 1861.

BROADWAY B'K: Your account has credit as follows.
Respectfully, yours,
HAMILTON B. DOX, *Cashier.*

May 1 ..... $609 58
60 96

Cash. 670 54
Exhibit B.

R. E. S., *U. S. Com.*

CHICAGO MARINE AND FIRE INSURANCE COMPANY,
Chicago, May 16, 1861.

J. L. EVERITT, Esq., *Cas., N. Y.:*

Your account has credit this day as follows.
Respectfully, yours,
HAMILTON B. DOX, *Secretary.*

26 Cash:
Butler & W $610 00
61 00

671 00

Williams, S. & Co.	$446 09
	44 60
	490 69

Manuf. May 21, '61.
Exhibit C.

R. E. S., *U. S. Com.*

CHICAGO MARINE AND FIRE INSURANCE COMPANY,
Chicago, May 17, 1861.

J. L. EVERITT, Esq., *Cas., N. Y.:*

Your account has credit this day as follows.

Respectfully, yours,

HAMILTON B. DOX, *Secretary.*

O. P. Bissell	$121 88
Gordon, B. & W	14 00
	135 80

MAY 21, '61.
Exhibit D.

R. E. S., *U. S. Com.*

The plaintiff then read the 2d deposition of Mortimer Ward, as follows:

Deposition of Mortimer Ward, taken on the 25th day of November, 1861, by me, at my office, 41 Chambers st., New York city, pursuant to the directions contained in commission hereto annexed in suit of the Broadway Bank, plaintiff, and the Marine Bank of Chicago, defendant. Said witness was duly sworn, and the answers of the witness were by me reduced to writing in the order in which they
27 were answered.

R. E. STILLWELL, *As. Comm.*

Interrogatory 1st. What is your age, occupation, and have you any interest in the result of this suit; and are you and have you ever been a stockholder in the plaintiff's bank?

To the 1st interrogatory he saith: My age is 32 years; clerk; I have no interest in the result of this suit, and am not a stockholder.

2d. Are you or not in the employment of plaintiff? If yea, how long have you been in its employment, and what has been your employment or duties for plaintiff?

To the second int. he saith: I am in the employ of the plaintiff, and have been for seven years past. I have been corresponding clerk and general bookkeeper.

3d. Have you ever given a deposition in this case? If yea, where, and who was present at the taking of it?

To the 3d. I gave a deposition in this suit in October last, and I think on the 26th day. The commissioner (Mr. Stillwell) and Mr. Wheeler.

4th. If you state in answer to the last interrogatory that you have

given a deposition in this case, state whether in such deposition you stated that p'ff sent defendant sundry notes for collection;
28 state your means of knowledge. If they were sent by mail, procure copies if practicable of all such letters and annex the same to your deposition. State who wrote the letters; and if they were not written by you, state by whom they were written, and your means of knowing by whom they were written.

To the 4th. I sent them; they were sent by mail. I did not write the letters, but compared them with the notes and signed the letters, and endorsed them myself. They were written by my assistants, and the copies are amended and marked A, B, C, D, E, F, and G.

Int. 5. If p'ff has received any letter or letters from defendant, acknowledging receipt of any notes or letters from p'ff, produce the same and annex them, and all letters from deft. to pl'ff, relating to the matter involved in this suit, to your deposition.

To the 5th. The plaintiffs have received sundry letters in reply to those I wrote, and I annex all the letters we now have on that subject, marked 1, 2, 3, and 4. I annexed some to the deposition before made by me in this suit, and I sent three to E. S. Smith, esq., to Chicago, and one other letter, of which A is a copy, was sent to the Marine Bank of Chicago, May 16, 1861, and which were returned to me with writing at the bottom. I replied to it on the same paper, and enclosed it with the items and returned it to them May 21, 1861, and they acknowledged receipt of it May 23d, 1861, and that acknowledgment was sent to E. S. Smith.

29 Int. 6. State what instructions, if any, were given by p'ff to defendant, about collecting said notes, whether written or verbal; if verbal, who gave them, and to whom were they given; if in writing, produce them or a copy of them.

To the 6th. I did give instructions, and those instructions were all in those letters.

MORTIMER WARD.

Subscribed and sworn to before me this 25th November, 1861.
[SEAL.] R. E. STILLWELL,
U. S. Com.

Com. fees, $8 38.

Copy A.

BROADWAY BANK,
New York, May 16th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received, with —— stated inclosures.

Very respectfully,
J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

J. Steveson,	May 28.....	$327 72 and exc.
E. P. Martin & Hersey,	" 29.....	790 40 and exc.

H. Slater & Co., May 29 ..... $230 00 and exc.
Wm. F. Stewarts, " 30 ..... 275 00 and exc.

Please return note of J. A. Cogswell, $619 14 and exc., due 23d, at Fulton, Ill.

30 Copy B.

BROADWAY BANK,
New York, May 25th, 1861.

H. B. Dox, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received, with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

Wheat & Shaw, June 13 ..... $50 53 and exc.
J. Stedman, " 9 ..... 165 50 and exc.
Carter & Osborn, " 11 ..... 338 74 and exc.
Ira Wilson, " 7 ..... 171 22 and exc.
E. J. Hachley, " 9 ..... 697 61 and exc.

Collect in specie or its equivalent, or protest and return.

Copy C.

BROADWAY BANK,
New York, April 8th, 1861.

H. B. Dox, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received, with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

B. W. Gray, April 21 .... $550 00 and exc. less ½ p. c.
M. Prescott, " 23 .... 283 55 and exc.
T. S. Gordon, " 21 .... 570 00 and exc.
L. A. & D. M. Halbert, " 21 .... 1,321 23 and exc.
F. Grannell, " 23 .... 1,090 66 and exc.
31 A. P. Bartlett, " 28 .... 1,060 00 and exc.
Neil Donnelly, " 24 .... 520 00 and exc.

Copy D.

BROADWAY BANK,
New York, April 15th, 1861.

H. B. Dox, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received, with stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

J. N. Hough,	May 9	$1,957 21	and exc.
T. Goldman,	Ap'l 26	138 06	and exc.
Brainerd & B.,	28	219 73	and exc., over ½.
R. Thompson & Co.,	29	92 43	and exc.
E. F. Pengert,	30	139 28	and exc.
W. Little & Co.,	30	1,126 07	and exc.
A. Switzer,	26	236 48	and exc.
Flagg & Barr,	27	313 97	and exc.
C. L. Hoyt,	28	609 58	and exc.
Jno. Barnard,	28	274 51	and exc.
E. H. Callicott,	28	341 56	and exc.
C. Buhl,	30	662	and exc.
W. F. Stewart,	30	268 40	and exc.
H. A. Tucker & Co.,		11 50	

32 Copy E.

BROADWAY BANK,
New York, April 29th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received, with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

Wm. Smith & Co.,	May 13	$446 09	and exc.
Butler & Weed,	15	610	and exc.

Please return note of W. H. Taylor, $100, due May 7th, at Chicago.

Copy F.

BROADWAY BANK,
New York, May 4th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received, with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

Ashabel Gridley,	June 26	$272 70	and exc.
Thee Goldman,	May 19 (taken out.)		
Clegg & Baker,	20	204 25	and exc.
J. A. Cogswell,	23	619 14	and exc.
O. P. Bissell,	15	121 88	and exc.

Note of Butler & Weed, $610, due 15th, will you please have it presented at the office of Butler & Hunt, 48 State st., if not paid at Geo. Smith & Co's., where it is made payable.

33 Copy G.

BROADWAY BANK,
New York, May 18th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account—

R. D. Smith,	St.	$277 87	and ½ ex.
Grover Ayers,	June 1	221 87	and exc.
Henry Root & Co.,	2	616 94	and exc.
J. J. Tower,	4	130	and exc.

I have received advice of payments of the following notes with exch'ge, but not the remittance. Have you remitted for them? I have received remittances for other items due after these.

L. A. & D. M. Halbert, Ottawa, $1,321 23, due Apr. 21.
C. L. Hoyt, Aurora, 609 58, " " 28.

(1.)

34 THE MARINE BANK OF CHICAGO,
CHICAGO MARINE AND FIRE INSURANCE COMPANY,
Chicago, Illinois, Ap'l 11, 1861.

J. L. EVERITT, Esq., *Cas., N. Y.:*

DEAR SIR: Your favor of the 8th ——, with enclosures, as stated, is received, and shall have attention.

Ex. 6 p. c. Respectfully, yours,

H. B. DOX, *Cas.*
ROBERTS.

(2.)

MARINE BANK OF CHICAGO,
Chicago, Ill., May 2d, 1861.

J. L. EVERITT, Esq., *Cas., N. Y.:*

DEAR SIR: Your favor 29th Ap'l rec'd, with stated enclosures, which shall have attention.

I return herewith, as requested, note of W. H. Taylor, $\frac{4}{7}$ of $100.

Also, under protest, note of Chs. Buhl, 30th Ap'l, $662.

Fees to debit, $2 34.

Yours, truly,

SAM. S. ROGERS, *A. Cas.*

(3.)

THE MARINE BANK OF CHICAGO,
CHICAGO MARINE & FIRE INSURANCE COMPANY,
Chicago, Illinois, May 7th, 1861.

35 J. L. EVERITT, Esq., *Cas., N. Y.:*

DEAR SIR: Your favor of the 4th inst., with enclosures as stated, is received, and shall have attention. Instructions noted.

I enclose for collection and my credit.

Yours, truly, H. B. DOX, *Cas.*
THOMPSON.

Exc., 10 p. c.

(4.)

MARINE BANK OF CHICAGO, *Chicago, Ill., 22d May,* 1861.

J. L. EVERITT, Esq., *Cas., N. Y.:*

DEAR SIR: I return herewith R. D. Smith, $277 87, rec'd in letter 18th inst., with three notes due June 1st, 2nd, and 4th, as stated, which are retained.

We return this, as it is payable with ½ exc. We cannot collect in funds, with which we can remit if paid. The cols. referred to are at yr. cr., with nom. rate of ex. added, and cannot be remitted for want of exch. Items since *in* exch. were remitted at once.

Y'rs, resp'y. SAM. S. ROGERS, *A. Cas.*

I also enclose under protest, Hoard & Hoes, 20th, $141 88. Fees to debit, $2 09

36 It was admitted that plaintiff had demanded payment of the defendant, of the above collections prior to the commencement of this suit, and that payment was refused except in the bills of Illinois banks, then greatly depreciated, and worth about sixty cents on the dollar, which bills passed as "currency" in Chicago and vicinity during the winter and spring of 1861, and until the 18th day of May, 1861.

The plaintiff here rested.

The defendant then read in evidence letter of plaintiff to defendant, dated Dec. 13, 1860, as follows:

37 BROADWAY BANK, *New York, Dec.* 13, 1860.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of the —— is received with —— stated inclosures.

Very respectfully,

J. L. EVERITT, *Cashier.*
WARD.

Please collect for our account.

Received your circular dated Dec. 8th. Collections made for us may be credited to our account, until further advice, unless they can be remitted for at a moderate rate.

Defendant then read in evidence the circular of Dec. 8, 1860, as follows:

MARINE BANK OF CHICAGO, *Chicago, Ill., Dec.* 8, 1860.

DEAR SIR: Our late circular had reference to a probably temporary interruption of our remittances in exchange, for collections made for our eastern correspondents.

We find, however, that the supply of eastern exchange diminishes daily; the amount is altogether unreliable, and rates have advanced to 8 and 10 per cent. for such funds as are current here.

We are obliged, therefore, to notify you that for the present, and until further notice, we shall place all funds received by us in payment of your collections to your credit, in such currency as is received here, (and when payable with exchange, with the nominal rate added, unless otherwise instructed by you,) to be drawn for only in like currency.

38 If this course is not agreeable to you, please advise us immediately, and we will either return your collections, or place them in the hands of such parties here as you may designate.

By order of the board.

HAMILTON B. DOX, *Cashier.*

Endorsed: Filed Dec. 13, 1861,

WM. H. BRADLEY, *Clk.*

Which defendant deposited in the post office at Chicago, Illinois, directed to plaintiff at New York, the postage prepaid.

The defendant then called one Hamilton B. Dox as a witness, who, being duly sworn, testified as follows:

I have been engaged in the banking business at Chicago, Illinois, for the last six years, and for the last year and a half have been the cashier of the defendant.

I know the plaintiff, and was cashier of the defendant at the time the several collections sued for in this case were made. I know what was the circulating medium at Chicago during the fall of 1860, and the winter and spring of 1861, and what was the meaning of the word "currency" as used during the last five or six years at Chicago, and vicinity.

The word "currency" meant the bills of the free banks of Illinois and Wisconsin, and which were always distinguished from coin and from the bills of other States than Illinois and Wisconsin.

In the fall of 1860, and until April, 1861, the "currency" in use for all business transactions at Chicago and vicinity was the bills of the free banks of Illinois and Wisconsin.

After the 1st April, 1861, and until May 18th, 1861, the currency or

paper in circulation was almost wholly composed of the issues of the free banks of Illinois.

39 As compared with coin or exchange on New York, this currency was always a depreciated currency.

It was of fluctuating and uncertain value.

Soon after the election in Nov., 1860, it began to depreciate in value. In Nov. and Dec., 1860, it was from 5 to 10 per cent. discount for coin.

The bills of the different banks differed greatly in value at the same time.

Their values depended upon the New York market value of the stocks deposited for the security of the bills; and the value of the different bank notes in circulation as "currency" in the fall of 1860 and winter following, and in the spring of 1861, was not uniform some being worth more than others.

In Nov., 1860, the bills of nine of the Illinois banks became so much depreciated in value, that they were thrown out or rejected by the banks and the community, and ceased to be used as currency.

After this, the remaining bills that were used as currency fluctuated in value from 5 to 10 per cent. discount for coin, until the first of April, 1861, when thirty more of the bills of the Illinois banks were thrown out or rejected and no longer used as currency.

After April 1st, 1861, there were about $6,500,000 of the bills of the Illinois banks in circulation, which was almost the sole circulating medium until May 18, 1861, when this currency had depreciated so much that it was no longer used as currency. It had then depreciated from 10 to nearly 50 per cent. from coin.

Some of the banks were then but little depreciated. The bills of the Marine Bank, the Bank of Galena, Bank of Ottawa, and

40 two or three others, were, on the 18th of May, 1861, not so much depreciated, and were worth 90 cents to par.

But these banks had only a very small circulation, say from $60 to $70,000 out of an entire circulation of nearly $6,500,000, and the bills of these banks had not for nearly a year before formed any appreciable part of the circulation in use as money.

During all the time I have been in banking business at Chicago, there has been a distinction and difference noted between this currency and other kinds of money.

Where a depositor or customer made a deposit with a bank, this currency was entered as such in his bank-book, and coin entered as such, and eastern funds as such, and the depositor drew it out as he paid it in, receiving gold for gold and currency for currency, unless, as was often the case, he was allowed a premium for his gold or eastern funds in currency, when he would draw out the whole in currency.

The currency when deposited was drawn out in like currency, unless gold or exchange on New York was specially called for, when the customer was charged the difference in value at the time between currency and gold or exchange, which fluctuated from time to time.

This currency declined in value during the winter and spring of 1861.

During all that time it was used in payment of debts, and in ordinary transactions of domestic business, as the circulating medium. We had hardly any other.

The collections made by defendant for plaintiff were all made in this currency, or in checks upon banks payable in this cur-
41 rency.

This was the currency referred to in the circular of Dec. 8, 1860.

We made all our collections for other parties, whether banks or private individuals, also in this currency, unless specially directed otherwise; and when we remitted to our eastern correspondents the proceeds of such collections, we charged them discount or difference between this currency and New York exchange, which varied from time to time.

New York exchange was always worth about $\frac{1}{4}$ or $\frac{1}{2}$ of one per cent. more than coin.

The funds of the bank were all kept together, including its own, those received on deposit, and for collections; all went into one fund. This fund was made up of this Illinois currency. It is usual and customary for banks and bankers to keep all their funds together.

The defendant put the funds received on collections for plaintiff with its own funds in the usual way.

This currency, which was received in payment of the collections made by defendant for plaintiff, was worth from 90 to 95 cents on the dollar at the time it was received by defendant.

It continued to depreciate in value, until May 18, 1861, as did all the like funds held by defendant, with which plaintiff were mixed. After that date, it was no longer used as money, but was bought and sold as a commodity by the brokers, at from 10 to 55 per cent. discount.

At the time of the demand for payment, made by plaintiff in this case, this currency was worth about 60 or 65 cents on the dollar.

By this is meant the average value of the bills which had
42 been used as currency or money, and in which plaintiff's collections had been made during the winter and spring of 1861, and until May 18, 1861.

The larger portion of these bills were secured by the bonds of the southern or seceded States; they had no other security than these bonds, except what might be got from the stockholders of the banks, after the stocks were sold in New York, under the banking law of Illinois, which liability of the stockholders was not by bankers regarded in estimating the market value of the bills issued by the banks.

The word "currency," as used in this place, referred to such bank bills as passed current in the community for business purposes, and which were used as money in ordinary business transactions, and these were principally bills issued by the banks of Illinois and Wisconsin.

The bills of all other banks than of those States were worth more

than those of Illinois and Wisconsin, and always brought a premium over those. There was but a limited amount of bills of other States in circulation in the winter and spring of 1861.

The plaintiff objected to all the foregoing evidence tending to show a usage or custom of the defendant and bankers in Chicago, and also as to the meaning attached to the word "currency."

The currency received by the defendant in payment of the demands collected by it for the plaintiff, were, when collected, placed by it with the other funds of the defendant. The defendant kept all funds together, as well those held by it for others on deposit or received from collections, and its own.

And from this common fund it used indiscriminately what-
43 ever it had occasion for in the daily transaction of business.

When the collections for the plaintiff were made, credit was given the plaintiff, as was the usual practice, in the books of the defendant, for the amount in dollars. This credit expressed the amount in dollars which defendant had collected for plaintiff in currency, which at the different times of collections were worth from 90 to 95 cents on the dollar in coin.

During the winter and spring months of 1861, and while the bills of the Illinois and Wisconsin banks were used as currency, the def't, as well as the other banks and bankers in Chicago, sorted the currency, reserving the best and paying out the poorest, so that the latter class of bills were chiefly in circulation and use in the community.

The foregoing was all the evidence in the case.

The court then charged the jury upon the law of the case, and among other instructions charged the jury that generally a bank or other party receiving a note for collection, in the absence of instructions, express or implied, had no right to receive anything but good money or gold and silver in payment; but if they believed from the evidence in this case that defendant was authorized expressly or by implication, by the plaintiff to receive the depreciated currency of Illinois in payment of notes sent it by plaintiff for collection, and to place the amount to the credit of the plaintiff in the same way as stated by Mr. Dox, to remain until called for by plaintiff, and that defendant did receive such currency in payment of the plaintiff's collections, and mixed it with its own funds as a part of its business
44 and banking capital, then the defendant is liable to the plaintiff for the value in coin of such currency at the times of payment, with interest from the time of demand of plaintiff for payment, unless the jury believe from the evidence that it was the agreement, express or implied, of the parties, that any loss by depreciation of such currency was at the plaintiff's risk, in which case the plaintiff is only entitled to recover the value in coin of such currency at the date of demand for payment, with interest from that time.

To the giving of which instruction the defendant then and there excepted.

The defendant asked the court to instruct the jury that if they believe from the evidence that the defendant was authorized by the plaintiff to receive in payment of collections for the plaintiff the de-

preciated currency of Illinois, or bills issued by the free banks of Illinois, and to place the amount to the credit of the plaintiff in the usual way, as stated by Mr. Dox, to remain until demanded by the plaintiff, then the plaintiff is only entitled to recover of the defendant the value in coin of such currency so received by the defendant at the time of demand made for payment by plaintiff, with interest from that date.

Which instructions the court refused to give. To which refusal of the court the defendant then and there excepted.

The defendant then moved for a new trial because of the alleged errors of the court in giving and refusing the several instruc-
45 tions above written. But the court overruled the motion and rendered judgment on the verdict.

To which decision of the court the defendant then and there excepted, and prayed that this its bill of exceptions be signed and sealed, which is done.

THOMAS DRUMMOND. [SEAL.]

Endorsed: Filed Dec'b'r 14th, 1862.

WM. H. BRADLEY, *Clk.*

46 And afterwards, to wit, on the 20th day of December, A. D. 1861, filed its appeal bond in the words and figures following, to wit:

Appeal bond.

In the United States circuit court for the northern district of Illinois.

MARINE BANK OF CHICAGO, plaintiff in error,
ads.
BROADWAY BANK, defendant in error.

Judgment for $3,147 44 damages, besides costs, rendered December 14, 1861.

Appeal bond.

Know all men by these presents that we, the Marine Bank of Chicago, as principal, and J. Young Scammon and Horatio G. Loomis, as sureties, are held and firmly bound unto the above-named Broadway Bank, in the sum of six thousand two hundred and ninety-four and $\frac{88}{100}$ dollars, to be paid to the said Broadway Bank, its successors and assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs, ex-
47 ecutors, and administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this sixteenth day of December, A. D. 1861.

Whereas the above-named Marine Bank of Chicago hath prosecuted a writ of error to the Supreme Court of the United States to reverse

the judgment rendered in the above-entitled suit by the circuit court of the United States for the northern district of Illinois, at the October term, A. D. 1861:

Now, therefore, the condition of this obligation is such that if the above-named Marine Bank of Chicago shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

In witness whereof, the said Marine Bank of Chicago, by its president and cashier, has hereunto set its corporate seal, and the said J. Young Scammon and Horatio G. Loomis have hereto set their hands and seals the day and year above written.

[SEAL.] J. YOUNG SCAMMON, *President.*
HAMILTON B. DOX, *Cashier.*
48 J. YOUNG SCAMMON. [SEAL.]
H. G. LOOMIS. [SEAL.]

Endorsed: Approved.

THOMAS DRUMMOND.

Filed Dec. 20th, 1861.

WM. H. BRADLEY, *Clerk.*

And on the 19th day of December, A. D. 1861, the said defendant sued out of said court a writ of error in the words and figures following, to wit:

Writ of error.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Broadway Bank and against Marine Bank of Chicago, a mani-
49 fest error hath happened, to the great damage of the said Marine Bank of Chcago, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, this nineteenth day

50 of December, in the year of our Lord one thousand eight hundred and sixty-one, and of our independence the eighty-sixth year.
[SEAL.]

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Dec. 23, 1861.

WM. H. BRADLEY, *Cl'k.*

And on the 23d day of December, A. D. 1861, the said defendants, by its attorneys, come and file in said court the citation issued in this behalf, in the words and figures following, to wit:

Citation.

United States of America to the Broadway Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December, A. D. 1862, pursuant to a writ of error filed in the clerk's office of the circuit court of the United
51 States for the seventh circuit and northern district of Illinois, wherein the Marine Bank of Chicago is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Signed this twenty-third day of December, in the year of our Lord one thousand eight hundred and sixty-one, (A. D. 1861.)

THOMAS DRUMMOND.

Service of this citation on me, by delivering a copy of the same to me and showing to me this original, is admitted this day to have been made December 23, 1861.

E. S. SMITH,
Att'y for B'dway B'k.

Endorsed: Filed Dec. 23, 1861.

WM. H. BRADLEY, *Clerk.*

52 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a true transcript of the record and proceedings had in the cause, wherein the Broadway Bank was plaintiff, and the Marine Bank of Chicago was defendant, as the same appears from the record of said cause, now remaining on file in said court, and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Chicago, this 19th day of November, A. D. 1862, and of our independence the 87th year.

WM. H. BRADLEY, *Cl'k.*

53 *Errors assigned.*

And now comes the said p'ff in error and assigns the following errors in the foregoing record:

1. The giving of the instruction to the jury for the def't in error, above set out, and excepted to.

2. The refusal to give the instruction asked for by the plaintiff in error.

By its att'y,

SAM. W. FULLER.

Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 193.

MARINE BANK OF CHICAGO,

Plaintiff in Error.

vs.

BROADWAY BANK,

Defendant in Error.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT OF THO. HOYNE, FOR PLAINTIFF.

Hon. S. W. FULLER, *of Counsel.*

CHICAGO:

BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.

SUPREME COURT OF THE UNITED STATES,

December Term, 1863:

THE MARINE BANK OF CHICAGO,
Plaintiff in Error,
vs.
THE BROADWAY BANK,
Defendant in Error.

Appeal.

BRIEF OF THE CASE.

The suit below, which comes here by appeal, was commenced in the United States Circuit Court of the Northern District of Illinois, in September, 1861; and judgment was finally rendered against the plaintiff in error in December, 1861, for the sum of $3,157.00.

The dealings, out of which the controversy in this case arose, commenced in the year 1860. The defendant in error was a banking corporation, doing business in the city of New York, and the plaintiff in error a banking corporation, located and doing business in the city of Chicago.

The claim upon which the judgment was rendered, arose out of certain collections made by the bank at Chicago, upon divers drafts, notes, and bills sent for collection and suit, in due and ordinary course of business, by the Broadway Bank in New York, during the Spring of 1861.

It appears in the record and bill of exceptions (see p. 19 & 21), that all these collections were made in what then constituted the

common currency of Illinois—otherwise called and known as "Illi-"nois Currency," and which consisted, mainly, of the issues of the Free Banks of Illinois, established under the General Banking Law. (Purple's Revised Statutes, P. 198).

It was insisted in the trial, and proved (see record, p. 21), that this currency declined in value during the Winter and Spring of 1861, so as to be greatly depreciated below par; but that during all that time, and up to the 17th of May, 1861, it was used in payment of debts, and in all the ordinary transactions of business, as a circulating medium, in lieu of all other money; and that all the collections for the defendants in error were made in this kind of currency.

It also appears in evidence, that it was, during all this time, a custom and usage among the banks and bankers of Chicago, to distinguish between this kind of currency, so generally known as "Illi-"nois currency," and all other kinds of convertible funds. That in accounts and dealings with their depositors and customers, this distinction was preserved in all their deposit and bank book accounts kept of collections, each entry or deposit being noted as either "gold," "Eastern funds," or "Illinois currency," as the case might be, and, as funds, were paid in one or the other kind of money; and the same being subject to draft or check, in *like funds*, when specifically called for as "gold," as "Eastern funds," or "ex-"change," by the check or draft of the depositor or customer.

It was a circumstance of very common occurrence, that when the customer had Eastern funds, exchange, or gold to deposit, that he converted it into Illinois currency, by selling it at a premium to the bank, at its counter, and making a deposit of the original sum with the amount of premium received, added, when the accounts would show the aggregate of such amount as a transaction or deposit in currency.

The testimony further shows, that it had been, and was always the custom and usage of bankers, on making collections, to keep

and mix the funds received on collections for others, with their own funds of a *like kind*, whether such collection was made in *specie*, *Eastern*, or *Illinois bills*. Generally, unless otherwise specially instructed, all collections for correspondents were made in this "Illi-
"nois currency"; and, at the time the claims sued upon were collected for the Broadway Bank, Illinois currency was depreciated greatly below par, it being then only worth 80 to 90 cents on the 100 cents, while upon all other funds the difference was only $\frac{1}{2}$ to $\frac{3}{4}$ between such funds and specie—specie being at a premium of $\frac{1}{4}$ to $\frac{3}{4}$ over all. The Illinois currency, so called, *had been always a depreciated currency*, as compared with other issues; and in November, 1860, owing to the then state of political agitation, arising out of the elections, and the threatened secession of the Southern States, whose stocks and bonds, constituted, in great part, the security upon which the circulation of the Illinois banks rested, the entire bank circulation of the State rapidly declined in value. From November, 1860, to the 18th of May, 1861, it was in a state of constant fluctuation, the tendency being general to a greater decline; taking the entire circulation as a body, although particular banks maintained a higher degree of credit or solvency. On the 1st of April, 1861, the bills of 30 of these Banks were utterly discarded, and refused in circulation by the business men and banks of the State; and after that, the whole circulation of the remaining State banks, being about $6,500,000, continued at an average discount of about 10 to 15 per cent. below par, or specie, until the 18th of May, 1861, when the whole body of this remaining circulation was utterly repudiated as a par currency.

There followed this repudiation a great "crisis" in the free banking system of Illinois, and this utter repudiation of their "curren-
"cy," thenceforth branded as "stump-tail" by the business men, put an end to its further circulation as a medium for the payment of debts in Illinois.

It was during the period of this general fluctuation of the currency, in the months of April and May, 1861, that all the collec-

tions of the defendant in error, were made in this common circulating medium, by the Marine Bank of Chicago, as agent for the defendant in error.

On the 8th day of December, A. D. 1860, previous to the receipt of the proceeds of the bills sent for collection, as above stated, a circular was issued by the bank in Chicago, to the defendant in error, and its receipt acknowledged by letter of Dec. 13, 1860, (see record, p. 19) of which circular the following is a copy:

"MARINE BANK OF CHICAGO,
"*Chicago, Ill., Dec.* 8, 1860.

"*Dear Sir*:—Our late circular had reference to a probably temporary interruption of our remittances in exchange, for collections made for our Eastern correspondents.

"We find, however, that the supply of Eastern exchange diminishes daily; the amount is altogether unreliable, and rates have advanced to 8 and 10 per cent. for such funds as are current here.

"We are obliged, therefore, to notify you that for the present, and until further notice, we shall place all funds received by us in payment of your collections to your credit, in such currency as is received here, (and when payable with exchange, with the nominal rate added, unless otherwise instructed by you), to be drawn for only in like currency.

"If this course is not agreeable to you, please advise us immediately, and we will either return your collections or place them in the hands of such parties here as you may designate.

[Signed,] "HAMILTON B. DOX, *Cashier*."

The defendant in error, in the letter acknowledging the receipt of above circular, says: "Collections made for us may be credited to our account until further advice, unless they can be remitted at a moderate rate."

There are three questions presented as matters of argument, arising out of the record in this case.

1st. The nature of the contract arising out of the dealings between the parties, was in all respects that usually arising out of the relations of principal and agent.

2nd. The extent of the liability assumed by the plaintiff, under these circumstances, could only be the actual value of the money received; all risks of loss or depreciation, as well as profit, being that of the defendant in error, as principal for whose benefit the collections were made; and—

3rd. The question of the amount of damages, in case of defalcation, has been established against the agent and the rule of damages in such cases.

I.

The relations between the defendant in error and plaintiff in error, as established by their course of dealings, was that of principal and agent.

The duty of the agent was "*to use all reasonable care and diligence, "the same that a reasonable man under similar circumstances, would "take of his own affairs.*" The agent is to conform to common usage in the absence of specific instructions, and the *loss*, if any, as well as the *gain*, is that of his principal.

2 Parsons on Contracts, p. 73;
Story on Agency, sec. 202;
Bank of Washington vs. *Triplett*, 1 Peters, 25;
Mills vs. *U. S. Bank*, 11 Wheat., 431;
Ætna Ins. Co. vs. *Alton City Bank*, 25 Ill., 243;
Mechanics' B'k vs. *Merchants' B'k*, 6 Metc. 26;
Wilson vs. *Smith*, 3 How., 763;
East Haddam Bank, 12 Conn., 383;

Parsons' Mercantile Law, p. 144;
Fabens vs. *Mercantile Bank*, 23 Pick 330;
New England Bank, 1 Cush., 177;
6 Howe & Johns. Md., 146.

Justice Story, in his work on Agency, expressly lays it down (sec. 202) that if payment is received in the usual manner of conducting like business transactions, as by receiving a check from a person in good credit, who should become insolvent before the check could be duly presented; or "*by receiving the common currency of* " *the country, which should afterwards become depreciated; in each* " *of these cases the loss would be that of the principal, and not that* " *of the agent.*"

But according to the circular of Dec. 8th, 1860, the receipt of which defendant acknowledges Dec. 13th, the principal is expressly notified that the common currency of Illinois is *so depreciated*, that the rates of exchange have advanced to 8 and 10 per cent., and that the supply is diminishing daily, and that until further notice the plaintiff in error would place all funds received by them in payment of collections, to the credit of the principal, *in such currency as was received in Chicago, to be drawn for only in like currency.* (Record p. 19).

In reply to which, the agents (the plaintiff in error) are expressly instructed "that collections made for the principals may be cred- " ited to their account until further advice, unless they can be " remitted for at a moderate rate." (Record p. 19.)

No demand having been made for the "currency" received on the collections, until after the whole body of Illinois currency ceased to have any value as a circulating medium, and it had de-

preciated to an average value of 60 per cent., it is submitted, that the true measure of the liability incurred by defendant below, was the actual value at *the time of the demand*, and not the *nominal amount of the dollars of currency received on the collections*, and sent to be made by the principals.

The plaintiff in error received, as agents, the proceeds of the collections sent them in "Illinois currency." That currency was depreciated at the time it was received. It was received according to the instructions of the principals. The bank kept it according to such instructions in *like* funds. They held it subject to their order until further advised, and *offered to pay it in like funds* when the demand was made; and the depreciation and loss, if any, should be borne by the principals and not the agents. And this is in accordance with every known rule of law and just dealing, recognized as regulating the relations of principal and agent.

The court below instructed the jury that the defendant below had no right to receive anything but good money, gold or silver, in payment (see Record p. 22); but if they believed that defendant was authorized, expressly or by implication, by the plaintiff to receive depreciated currency of Illinois in payment of notes sent it for collection, and to place the amount to credit of plaintiff, in same way as stated by Mr. Dox, to remain until called for by the plaintiff, and that defendant did receive such currency in payment of plaintiff's collection, and mixed it with its own funds, as a part of its business and banking capital, ("*then the defendant was liable to "the plaintiff for the value in coin of such currency, at the time of "payment, with interest from the time of demand of payment by "plaintiff; unless the jury believe, from the evidence, it was the " agreement, express or implied, of the parties, that any loss or de- " preciation of such currency was at plaintiff's risk, in which case " the plaintiff could only recover the value in coin of such currency " at the date of demand for payment, with interest from that time.*") (Record p. 22.)

We insist that the above instruction is erroneous in annexing the qualifications (inclosed above in parentheses) to the plain principle or rule which exempts the agent from any *risk of loss or depreciation, arising out of the business of the principal, transacted in accordance with his instructions*, because the court below instructs the jury "that in order to secure such exemption from *risk or* " *loss thus suffered* by the principal, the jury must further believe " that it was the AGREEMENT, *express or implied*, between the " parties, that any loss or depreciation of such currency was at the " principal's risk."

We respectfully submit that, in law, this risk inevitably resulted from the relations existing, and that if any loss occurred while the plaintiffs in error were acting according to the instructions of their principal, that the principal, and not the agent, assumed to take the risk, and that no special or further *agreement* was necessary to be understood or found in order to place the loss upon the principal.

The court, therefore, erred in refusing the instructions asked for by the plaintiff in error. That instruction was based upon the general and well recognized rule, that if depreciated currency was received according to the instructions or authority of the principals, and the amount was placed to their credit, in the usual way of business, to remain until demanded by the principals, that then the plaintiff was only entitled to recover of defendant the value in coin of such currency at the time that a demand was made for payment by plaintiff with interest. (See Record, p. 23.)

II.

The agreement, which is one of purely legal implication, arising out of the relations of the parties, has been treated by the court below as if the subject of the contract had been *money*, and not *property* or *coin*, instead of *depreciated bank notes*.

The truth is, that neither as a rule in estimating damages, or as a discharge of obligations assumed by the bank (plaintiff in error) as an agent, can the depreciated currency received be treated, in a legal sense, as anything but a *commodity* in which the parties *were dealing*, and that upon default or failure to perform the duty required, or to deliver the commodity due upon the contract, the only measure of damages would be the *value of the thing demanded* and to be delivered at the time of the demand made.

And this involves considerations which affect the form of the action, being in assumpsit for money had and received, and money paid, &c., under the money counts of the declaration, there being no special counts in detinue or alleged failure as upon any special matter to deliver or pay anything but money in the declaration; and

2d. Whether either party, by dealing with the other in depreciated bank paper, or notes, can recover anything more than the *real value* of the paper at the time of demand, if any default or breach has been made.

Illinois currency was not money, nor could it be treated as such by agreement of the parties in any higher sense than other "*choses* "*in action*," or *bills*, or *promissory notes*, issued by any corporation or person whatsoever.

The courts universally, from the time of the decision of *Miller* vs. *Race*, 1 Bun. 452, down to the present, have never held bank notes money, for any purpose, unless at once *convertible* into *coin* or *money*. This *convertibility* into coin or money has ever remained the true test of their availability as money in any sense, even when treated between parties as a good payment or discharge of a debt or judgment.

Ontario Bank vs. *Lightbody*, 13 Wend. 101;

In this case Senator VAN SCHAACK, delivering the opinion of the Court of Errors, says, "That there is no adjudged case in the

" books to authorize the inference that bank notes have ever been " considered as money, except under the universally implied under- " standing that the banks which issued the paper were *able to* " redeem, or to substitute a full equivalent for their issues, in coin; " and therefore it is not a sound inference from the cases to say " that the paper of a bank shall be entitled to the same considera- " tion as money, when the bank has failed, that it had before.

" And again: by the terms of this agreement, neither party " regards bank paper as money. The circulation of its bills is de- " rived from its credit, and its credit is the concomitant of its ac- " knowledged and permanent solvency. Its bills circulate like coin " money, so long as their representative character remains unim- " paired; but a bank bill is not money, according to the significance " of that word. It is admitted that bank notes, as the circulating " medium of the country, have acquired the denomination of " money from their convenience as a substitute for gold and silver, " and their utility in promoting the objects of trade and in enlarg- " ing the products of industry; but after a bank has failed, its " notes are deprived of those characteristics of money which entitle " them to that appellation by the custom of trade while they con- " tinued at a *value equivalent to specie.* Their convertibility into " specie being lost, and their power of circulation having departed, " not one of the ingredients of money remains, and they can be " legally defined only as 'unpaid promissory notes.'"

And so it will be found in all cases, that the courts, with a degree of unanimity remarkable, and by a parity of reasoning to which there is scarcely any exception, have held—

1st, That in all cases of bank suspensions or insolvency, where the notes of the bank are not convertible into coin or specie, that the paper as to that class of banks is treated like any other "chose " in action," or dishonored species of commercial promises, bill, or obligation to pay money, the real *value* of which, and not its face, would be the measure of damages in any question of a breach of

contract, or failure to deliver such paper as between parties; and—

2d, That although bank notes, in some cases, where convertible or the equivalent of money, may be treated as money, yet it is found universally true, that nearly in every case where a contract, express or implied, is made payable in any species of *bank notes*, as such, instead of as generally, in lawful money, expressed by the simple word usually inserted, "dollars," in a contract, that the courts have unanimously agreed in repudiating the idea that such contracts are to be treated as if payable *in money*, instead of regarding it as a contract payable in some other commodity or property or thing, the value of which is to be assessed in money.

The following cases are cited to illustrate the positions taken:

In *Scott* vs. *Conover*, (1 Halsted, 225), the distinction is made in a contract to pay a certain sum in current bank notes of the States of New Jersey and New York, when it was held that, an *action of debt* would not lie, "*eo nomine*," for the sum specified, because they were not money, and that an *action* of *covenant* was the only remedy on such a contract in which the plaintiff could recover his *real* damages, according to the value of the bank notes.

But the court further says, in delivering their opinion, "that "*bank notes are not money.* They are not always and in all places "of the value of money. They were not so at the time of this "contract. * * * But it is of no consequence whether they "were of less or of equal or greater value, still they are not the "thing itself. *They are no standard of value.* Suppose the contract had been to pay in the bank notes of Kentucky, which we "are told are now depreciated 100 per cent., should we now render "a *judgment here for the whole amount in lawful money?*"

"It is true that, in common parlance, bank notes are called mon-"ey. They pass from hand to hand like money, without endorse-"ment. They are, by common consent, a sort of measure of value;

" they were so of necessity, even when the banks stopped payment,
" and when they were five and twenty per cent. below the value
" of money; and they are so, even at this day, in some of the
" Western States, where they are one-half below it."

In the case of *Farwell & Co.* vs. *Kennet*, (in 7 Missouri R., p. 595) the suit was brought on a bill of exchange drawn by Corwith & Co., of Galena, on Farwell & Co., at St. Louis; *but it was payable in "currency,"* for $2,000.

The courts say, that "at date of that bill, '*currency*' was not re-
" garded as '*cash*.' The value of currency was fluctuating. The
" word '*currency*' was introduced to protect drawers and parties
" against a demand for '*lawful money*.' Experience has taught us
" that there is a wide difference between the *currency contemplated*
" *by law* and the *actual currency*."

In this case, also, be it observed, that the court took *judicial notice* of the condition of the currency in which the bill was payable.

In *Kirkpatrick* vs. *McCullough*, (3 Humph. Tenn. R., p. 171) after a full review of all the cases, it is decided that a note made payable in "*current bank notes*," is not a promissory note, payable in money, upon which an "action of debt will lie," nor is it held to be a negotiable note.

The court, in deciding this case, say, that "in case of *Gamble* vs.
" *Hatton*, (Peck's R., 130) it was settled that debt would not lie
" upon a note for $629, payable in 'current bank notes,' because
" current bank notes do not mean gold or silver, and all the *plain-*
" *tiff can ask in case of non-performance of the contract, would be*
" *as much money, in gold and silver, as the bank notes were worth*
" *at the time*."

In case of *McCormick* vs. *Trotter* (10 Serg. R., p. 94), was a case upon a note payable in the "*bills of the chartered banks of Penn-*

"*sylvania*";·and the court, in deciding that it was not a promissory note, because "*not payable in money*," say "that the note, so far "from being payable in money, was payable in more than 'forty' "kinds of paper, of different values."

Fry vs. *Possear*, 3 McLean R., 106;
Hasbrouck vs. *Seaman*, 2 ibid, 10;
Levy vs. *Holbrook*, 4 Ala. R., 88;
Leiber vs. *Goodrich*. 5 Cow., 186;
Thompson vs. *Sloan*, 23 Wend., 71;
Gay vs. *Donahoe*, 4 Watts, 400;
Robinson vs. *Noble's executors*, 8 Peters, 181;
Clay vs. *Hueston's administrators*, 1 Bibb, 461;
Anderson vs. *Ewing*, 3 Littell, 245;
Philips vs. *Riley*, 3 Conn., 366;
Hixon vs. *Hixon*, 7 Humph., 33;
Gordon vs. *Parker*, 2 S. & M., 485;
Dillard vs. *Evans*, 4 Pike (Ark.), 175;
Fogg vs. *Sawyer*, 9 N. H., 365.

To give effect and application in these cases to the principles which we have above cited, it will be necessary to remember that, at the time the authority to collect in Illinois currency was expressly conferred by the principals in this case, upon their agent, the plaintiff in error, that all the banks of Illinois were in a state of suspension, that their issues were in fact *irredeemable*, and that they had become virtually *insolvent*.

Prior to an act of February 14, 1861, the General Banking Law of the State (1 Purple Rev'd. Stat., p. 203), the bill holders were secured by stocks deposited with the State Auditor, who, upon the failure of any bank to redeem its notes in specie, on presentation, was to put the bank at once into liquidation, by an application for a Receiver, to take into his hands all the assets of the institution, suspend the powers of the bank, and suspend the functions of all

the bank officers; sell and convert all the property, and apply the proceeds to—*first*, the payment of the bill-holders, and then of the other creditors in a specified order.

But by the act of February 14th, 1861, the legislature of Illinois, finding all the banks in a state of suspension, enacted that the banks then under protest, or under a call to make up deficiencies of security, or in process of liquidation, should not forfeit their charters or privileges, or be liable to have their bonds sold to redeem their circulating notes, for six months from the passage of that act. (See Acts 1861, p. 40.)

It was provided further, that the Auditor might deliver up the securities on deposit in his hands by any bank, to the holder of its notes—an equitable proportion of such securities to be in proportion according to their value to the whole amount of its notes in circulation—or "in the same proportion that the whole amount of "the securities of said bank deposited with the Auditor, estimated "at their cash value at the time of such delivery, bear to the whole "amount of circulation then outstanding."

After the passage of this act, the redemption of a bank bill or bank note, by an Illinois bank, was a thing unknown; and to enforce its redemption, a legal impossibility; and from that time, the courts, as well as the world, had notice that Illinois bank notes were *irredeemable—discredited bills*, nothing more than other discredited or *unpaid promissory notes* or *choses in action*, being neither representatively or otherwise equivalent to coin—or money—nor could they by means be converted into money.

III.

Assuming, therefore, that a breach of contract occurred, and the plaintiff in error was in default, which is to be assessed against it

in this action, what is the real measure of damages to be applied upon a failure to make payment of such notes or bills upon a contract, specially entered into with reference to the kind of currency which constituted the subject of the agreement?

It is certainly apparent from the record that the implied contract, arising from the dealings between the parties, had special reference to this depreciated currency—"Illinois currency," so called, or Illinois bank notes; that though the bank (plaintiff in error), as agent, made collections of what was called, and passed as *currency*, yet that it was of a kind known to be a depreciated and irredeemable bank note currency; that common usage and custom required, at that time, banks and bankers to take and pay it out in the ordinary transactions of business; that according to the same usage and customs, separate accounts were kept with all depositors or customers of the banks in Chicago; that accordingly, three distinct kinds of money or funds were recognized and kept, viz: 1st, *the usual* "Illinois currency" account; 2nd, *the specie or gold account;* and 3rd, what was known as *Eastern funds*, i. e., notes of banks convertible into coin or specie, or Eastern exchange, the equivalent of coin.

In either of these several kinds of funds, kept by a bank or banker, the customer acquired special credit for money deposited, and under such circumstances, the obligation of the bank was fixed to pay out the "*like funds*" as it had received.

To have undertaken to pay out for paper received *one day*, gold or silver on the *day following*, when the difference of value was fluctuating ten to fifteen per cent. in favor of specie, would be such insanity as that no court will presume it as an obligation voluntarily assumed by the bank. Besides, it is shown that customers at the bank frequently sold their gold, or best money, to the banker for the highest price in *currency*—reducing it to Illinois bank notes—and obtaining credit in currency for the larger sum; thus, each $100 in gold, not unfrequently found its way from the pocket of

the customer to the book of the bank, as $115, the customer thus taking 15 dollars for accepting, as his own, the risk of depreciation or rise, and relieving the banker.

We therefore submit, that if the plaintiff in error be liable in this action below as for "*money had and received*"; if he be in default, it shall not be assessed against him according to the number of dollars of the bank notes received, numerically considered, but according to the real value of the things or securities mentioned, in proportion to their number.

The Supreme Court of Illinois (*Smith* vs. *Dunlap*, 12 Ill., p. 184), lay down the true principles governing in such cases as the present.

Upon a contract, payable for $130,480 in State indebtedness, in construing the contract according to the rule stated, decide:

"When the promisor undertakes to pay a certain number of dol-
"lars, or specific articles, such as grain, cattle, or other commodi-
"ties, he must deliver property on the day named in the contract,
"or he becomes absolutely bound to pay the sum stated in money.

"But where the promisor agrees to pay a certain sum in bank
"notes, or other evidences of indebtedness which purport on their
"face to represent dollars, and can be counted as such, the sum is
"indicated by the number of dollars of the notes or evidences of
"debt to be paid, and not the amount of the debt, or the consider-
"tion. The obligation is, in fact, but a promise to pay or deliver
"so many dollars, numerically, of the securities described. If the
"debtor fails to deliver them according to the terms of the contract,
"he is responsible only for *their real value*, and not their *nominal*
"amount. The *cash value of the thing is the true amount of the*
"*debt to be discharged.*"

In support of his rule, Judge TREAT cites a number of cases of approved authority, and finally concludes, "that the *true measure*

"of damages for a non-fulfillment of such contract, is the market "value in specie of such State indebtedness, on the day the con- "tract or note matured, and interest to the day of trial."

I have already cited the case in 7 Mo., of the bill of exchange "*payable in currency*," p. 595. In respect to the damages in that case, the court says that, "the construction of the bill is, that the "party will pay the amount in currency, and a tender of the me- "dium used as currency would have discharged the acceptor, and "if he failed to pay in currency at the proper time, then he be- "came liable for two thousand dollars in currency, the *value of* "*which in specie would be ascertained in like manner as the value* "*of any other commodity.* A judgment could not be rendered "for currency, but only for dollars and cents, to be paid in specie."

See, also, in support of same principles—

1 Halstead's Rep., 225;
3 Humh. Rep., 171;
14 Ill. Rep., 105.

Mem.—And these cases, also to the point, that such contracts cannot be recovered upon under the money counts, or in an action of debt, but in covenant, or upon the special promise or contract.

IV.

Mixing of Funds.

The mixing of funds is relied upon in this case by defendant in error, because, as agent, the plaintiff in error did not keep the funds received, in each case, in separate packages from their own, but entered a general credit in "dollars," to the several customers who dealt with them.

The custom and usage of the bank (the plaintiff in error), in this case, was the custom and usage of all the banks of the country—a

custom well known to the bank (defendant in error), who requested the acceptance of the depreciated currency of Illinois. To keep accounts with packages was a thing impracticable. According to well known usage, therefore, which became a part of the contract, as much so as if incorporated in writing between them, the intermixing of the funds was authorized in the present instance by the principal.

They cannot now demand that, because of such intermixture by the agent, of his funds of a like kind with their own, that the entire mass of currency in which both were dealing, shall become gold, coin, and par funds. For such a transmutation we must leave the law and go to fable. Certainly, there is no legal principle by which such a result can be produced.

Suppose we admit the premises, what then would be the advantage of the plaintiff below? The doctrine of *intermixture* is stated in "Story on Bailments," sec. 40: "If the intermixture *be by con-* "*sent*, I apprehend that in both cases the proprietors have an in- "terest in common, in proportion to their respective shares. But "if one willfully intermixes his money, corn, or hay, with that of "another man, without his approbation or knowledge, or casts gold "in like manner into another man's melting pot or crucible, the "civil law, though it gives the sole property of the whole to him "who has not interposed in the mixture, yet allows a satisfaction "to the other for what he has so imprudently lost."

The mixture in this case throughout has been an intermixture by *consent*, according to the well known custom of bankers, to credit the kind of funds received, and keep all accounts of different persons with that *kind* of *funds*, or "*like funds*," separate and distinct from each other. The plaintiffs below were bankers, as well as the defendants acting as their agents, and knowing the impracticability of conducting a large business in any other manner than according to such usage and custom, the implication of law and reason is, from the kind of dealings, that they must have con-

sented to the usage and custom of all bankers. This being the contract then, what obligations did it impose upon the defendants below? Simply this, that the agent (the plaintiff in error) could collect in "*Illinois currency*" and pay in "*Illinois currency*" the same amount as was received or *collected upon account* of their principals, and safely keep such funds until "*further advised*" to remit, or a *demand* was made, or in case of breach or failure, then to pay the *real value* of such currency, on the day of demand made, with interest.

In *Low* vs. *Martin*, 18 Ills. 287, there was a mixture, by implied consent, of the grain of different parties in a grain warehouse, and the court, in deciding the case against a recovery by the plaintiff for the supposed wrong, says: "That there being *no wrong*, the "plaintiff lost his particular separate property in the corn he de- "livered, and acquired an undivided aliquot part of the whole "mass."

It follows that if the mixture was by consent, and there being no wrong, the utmost claim of the defendant in error below was the value of this *aliquot* part of the mass of Illinois currency undivided, for which no claim was ever made, but which, if made, the plaintiff in error was willing always to pay, taking the average of all the funds not merely in the bank, but of all the same kind of currency in circulation in the State. The action is for money had and received, and not in *trover detinue*, or upon a special contract for a failure to deliver up the *commodities* or securities received, and this would be conclusive in bar of recovery on the ground of any intermixture in this case, the doctrine of confusion of goods having no application whatever to *money*, but to things.

But finally we insist—

V.

That *no default* was ever made by the defendant below, (the plaintiff in error) as it will be seen (Record, p, 18,) "that upon a "demand being made the plaintiff in error tendered the amount "due in Illinois bank bills, worth, it was said, about 60 cents on "the dollar at that time, and it is not pretended that the amount "received in such bills for the defendant in error was worth more "than the notes so tendered."

The court below has proceeded upon the principle, and indeed the entire proceeding seems to assume that the plaintiff in error, acting only as agent for collection, did in some way *guarantee the soundness* of the Illinois currency or bank notes collected.

For it does not seem sufficient to show that we declined to be responsible as agents for its collection, unless authorized (see the circular of Dec. 8) expressly, and that, upon being so authorized, we proposed, as usual, to remit at the usual prices of exchange, as soon as collected, but that, upon being instructed to hold it until further advised, instead of paying for exchange, we did so hold it; but now it is also said that unless we can also show that our principal further *agreed* to take the risk of a greater depreciation of the commodity received upon their account, which they knew was of daily fluctuating and uncertain value, and which was taken per their instructions, according to their sole request and solely for their account, that we must suffer all loss of *further depreciation in price or value*, or in other words, *guarantee to the principal that no greater depreciation or loss shall occur in his business*, for all which we receive no consideration whatever.

With all respect to the courts below, deciding these cases against plaintiff in error, we must be permitted most solemnly to aver our conviction that no precedent or case can be found attaching liability under such circumstances to any agency whatever, and that such

an utter subversion of the plainest principles of legal and natural justice is not warranted by a single text book, book of reports, or commentary, to be found in any civilized code of jurisprudence.

In any possible interpretation which can properly be given to the contract existing between the parties, the plaintiff in error never undertook to be bound for more than they undertook to receive, and that undertaking was limited to a particular kind of property or security called money, but which as usually interpreted, was no more than any other kind of notes or commodity, and in respect to which, the liability could not, in any event of failure, extend beyond the *real value* of such commodity.

Anderson vs. *Ewing*, 3 Littell Rep. 245;

A case in which the plaintiff sought to recover *as money* the amount of a note *payable in bank notes, such as were received at the Hopkinsville branch bank* at that time, the court say, "It was a "contract which only bound the party to pay so many paper dol- "lars as, when counted at par, would amount to the sum of $800, "named on the contract, and that the defendant had his election to "discharge the contract on the day stipulated, in articles (i. e. "bank bills) of either greater or less value or quality, and that the "*latter is taken as the proper criterion of damage* sustained by a "breach of the stipulation. Of course the notes lowest in value "on the day ought in this case be taken. It then clearly follows "that the defendant ought to have been at liberty to show what "was the real value in specie of such notes on the day of payment, "as the demand against him was about to be liquidated against "him in specie."

ILLINOIS DECISIONS.

Addenda.

Since the commencement in the court below of the suit now pending in this court by appeal, and growing out of the same general subject, out of which the controversy in this cause arises, there have been several decisions made by the Supreme Court of Illinois, in cases before that tribunal by appeal, which will no doubt be referred to and cited by the defendant in error.

The cases which are pertinent to this case, as touching the points we make upon this record, are—

Chicago Fire & Marine In. Co. vs. *Keiron*, 27 Ill., 506;
Marine Bank vs. *Chandler*, ibid, 549;
Chicago Fire & Marine In. Co. vs. *Carpenter*, 28 Ill., 360;
Marine Bank vs. *Rushmore*, 28 Ill., 477.

Upon an examination of these cases, it will be found that the court hold, in the *absence of any agreement* between the parties, that where, as between a bank and its customers, "Illinois cur-" rency" is treated *as money*, that the bank is held to the "*payment* " *of paper, or currency, answering all the purposes of the constitu-* " *tional coin of the country.*"

27 Ill., 506.

The question in the first of the cases above cited, arose upon the meaning of the words, "Illinois currency," as used in a certificate of deposit, and the court holds, that commercial usage and the general understanding of the community must prevail over any local

signification of the term "Illinois currency," in the absence of any agreement between the parties; and that it must be such paper as passes current in payment of debts, in lieu of constitutional money, &c., though upon this point the court is divided in opinion, Chief Justice CATON holding, in all the cases, "that the terms "'currency,' or 'Illinois currency,' to pay which, in terms, the "promises were made, had a local signification well understood by "all parties, and that they did not mean gold or silver, or their "equivalent."

27 Ill., p. 507.

We especially desire the attention of this court to his opinion, as containing the correct principles of law, applicable to all the cases decided in the Illinois courts.

The court will also find, in the case of *Marine Bank* vs. *Chandler*, 27 Ill., 548, the court using this language: "That parties may con- "tract to receive any commodity in lieu of money, is undeniably "true. This can only be done by special agreement, and not by "usage. No custom can compel a creditor, in the absence of agree- "ment, to receive anything but the constitutional currency of the "country," &c.

Again, in the case of *Marine Bank* vs. *Rushmore*, 28 Ill., 477, the court say: "The third instruction is ingeniously drawn. *There* "*is no evidence in the record to warrant the jury in believing that* "*appellants were authorized to take depreciated currency, or that* "*they received such currency in payment of these certificates, and* "*held them at the risk of appellees*," &c.

Enough is now cited of these opinions of the Judges in Illinois to mark the *distinction* between those cases and the record in the cases at the bar of this court.

In the cases at bar the record does show: *that the appellants were authorized to take depreciated currency, and that they did re-*

ceive such currency in payment of the debts sent to them for collection, and that there was a specific understanding and agreement between the parties, that the appellants should receive the commodity known as "Illinois currency," a depreciated and non-redeemable currency, in payment of the demands of the appellees, and also hold it until further notified or advised.

In the cases cited from the Illinois Reports there can be found no "*circular*" like that of Dec. 8, 1860, the receipt of which was acknowledged by appellees upon the record now before this court. (See Record, p. 19.) In this circular the appellees are distinctly notified of what (even if, as bankers, they could not be presumed already to know the fact,) was the true condition and character of the funds to be received in payment of appellees' collections, "that rates of exchange had already advanced to 8 and 10 per "cent. on such funds, and that the supply, even at these ruinous "rates, was diminishing daily," that the appellants would place all such funds, received in payment of the collections, to appellee's credit, in such currency as was received, (unless otherwise instructed) to be drawn for *only in like currency*, and that if this course was not agreeable to appellees they were requested to advise the appellants immediately, and the collections would be returned or placed in the hands of such parties as the appellees might designate.

There is scarcely a doubt that if this evidence of the understanding upon which the appellants in this case undertook the duty of agency for appellees, in receiving the funds in question, had been before the courts of Illinois, that their conclusions would have been in harmony with the well recognized principles governing all the cases of principal and agent, and the results in those cases have been different.

The views of that intelligent and distinguished tribunal, in respect to the general subject of bank paper, or issues of bank notes, when they cease, from any cause, to be redeemable, or become de-

preciated in circulation below par, are in perfect accordance with all the rulings of the most enlightened and distinguished jurists of the country, whose opinions are recorded in the cases already cited in this brief.

Swift vs. *Whitney*, 20 Ills. 144;
Moore vs. *Morris*, 20 Ills. 258;
Sloan vs. *Petrie*, 16 Ills. 268;
Stevenson vs. *Unkefer*, 14 Ills. 105.

THO. HOYNE.

HON. S. W. FULLER,
Of Counsel.

Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 193.

MARINE BANK OF CHICAGO,

Plaintiff in Error.

VS.

BROADWAY BANK,

Defendant in Error.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

E. S. SMITH, ATTORNEY FOR DEFENDANT IN ERROR.

S. W. FULLER, ATTORNEY FOR PLAINTIFF IN ERROR.

CHICAGO:

BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.

Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 193.

MARINE BANK OF CHICAGO,

Plaintiff in Error.

VS.

BROADWAY BANK,

Defendant in Error.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

E. S. SMITH, ATTORNEY FOR DEFENDANT IN ERROR.

S. W. FULLER, ATTORNEY FOR PLAINTIFF IN ERROR.

CHICAGO:

BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.

STATEMENT BY DEFENDANT IN ERROR.

This suit was brought to recover the several sums collected by plaintiff in error, on account of defendant in error, on the several notes described as follows:

Date of Collection.	Note against.	Page of rec'd showing Collection.	Am't of Note.	A'mt of Note Collected.	Exchange Collected.	Total of Coll'n & Exch'ge
Apr'l 25, '61.	L. A. & D. M. Hulbert	12	$1,321 33	$1,321 33	$66 06	$3,387 29
" 30, '61.	C. L. Hoyt	12	609 58	609 58	60 96	670 54
May 16, '61.	Wm. Smith & Co	13	446 09	446 09	44 60	490 69
" " "	Butler & Weed	12	610 00	610 00	61 00	671 00
" 17, '61.	O. P. Bissell	13	121 88	121 88	14 00	135 80
	Ira Wilson		171 22			
	I. Stedman		327 72			
	Total		$3,607 82	$3,108 88	246 62	$3,355 32

Dec. 4, 1861. Verdict for damages, $3,632.81.

Dec. 14, 1861. On motion for new trial, and intimation of the court, the plaintiff below entered a remitter for $505.37 and withdrew note of Ira Wilson and I. Stedman; thereupon judgment was entered for $3,157.44 and costs.

The remitter being for $197.88 above the two notes withdrawn. Record pages 8 and 9.

The reason the two notes were withdrawn is, the proof did not show, or it was admitted that the amounts had been collected by an agent of the plaintiff in error and not paid over.

The verdict, as it stands, being for the amount of the notes collected, without the exchange collected, and some interest after demand.

The foregoing statement is made to show the exact state of the case, for the reason that the record does not show why the notes were withdrawn, nor the reason for the remitter.

There is no error, however, alleged on this account.

DEFENDANT'S POINTS.

I.

The amount of the collections made by the plaintiff in error upon the notes and placed to the credit of the defendant in error became a general deposit of so much money, upon which the relation of debtor and creditor existed, and the plaintiff became liable to pay the amount in money.

II.

There is no error against the plaintiff in the instruction given by the court to the jury, to which the plaintiff in error excepted.

III.

There is no error in the refusal by the court to give the instructions asked by the plaintiff in error, for the reason that there is no proof in the case to warrant such instructions.

May it please the Court:

From the proof in the record there can be no dispute as to the fact that the several notes were sent out, and that the plaintiff collected the several amounts claimed in the statement above, for account of defendant in error (see printed record, pages 10 and 11).

The letter of instructions enclosing the notes of Wilson and Stedman, of date May 25th, 1861, contains these words: "Collect in specie or its equivalent or protest and return" (page 10).

Mr. Dox, cashier of the Marine Bank of Chicago, in his letter of date April 25th, 1861, says that the defendant in error had credit,

cash, $1,387.29, and of date April 30th, 1861, a credit, cash, $670.54. Also, of date May 16th, 1861, credit, cash, $671.00 and $490.00, and may 17th, 1861, credit, $135.80 (pages 12 and 13).

The letter of Mr. Everett, cashier for defendant in error, May 4th, 1861 (page 11), directs as to the presentation for payment of the Butler & Weed note. Mr. Everett's letter of the 18th, same month, contains these words: "*I have received advice of payment of* "*the following notes, with exchange, but not the remittance. Have* "*you remitted for them? D. A. & D. M. Hulbert, Ottowa,* "$1,321.23; *C. S. Hoyt, Aurora,* $609.58."

The circular of Dec. 8, 1860, and the letter of Mr. Everetts, of Dec. 13, 1860 (page 19), are all the evidence relied upon to show authority to the plaintiff in error to receive, in payment of collections for the defendant in error, currency of Illinois.

The substance of the circular referred to, is to the effect that, for want of exchange, all funds received in payment of defendant's collections, would be placed to their credit in currency, as is received in Chicago, to be drawn for only in like currency.

The letter referred to, of date Dec. 13, 1861, is as follows: "Re- "ceived your circular, dated Dec. 8. Collections made for us may "be credited to our account until further advice unless they can be "remitted for at a moderate rate."

Not one word about any particular bank paper can be found in the circular. The words, "such funds as are current here," "such currency as is received here," are words used in the circular. The answer to the circular, authorizing a credit, can only be understood to authorize the collections and credit in currency.

We submit, if the court please, that the evidence fails to show any authority in the plaintiff in error to receive anything, in payment of collections of defendant, of less value than currency. That term, having a definite and fixed legal meaning, did not give any authority to receive depreciated paper of any bank, either in or out of the State of Illinois.

The evidence fails entirely to show authority in the plaintiff in error to mix the currency received for the defendant in error with the general funds of the bank. Mr. Everett could not, from the circular, have understood the plaintiff in error to ask for any such authority as contended for, nor to give notice that depreciated bank notes would be received and placed, as such, to the credit of the defendant in error. If such a proposition had been made by Mr. Dox, it would have been, at once, refused. From this notice, Mr. Everett could not have expected anything but a credit of so many dollars, for which the plaintiff in error became debtor to the defendant, and liable to pay the amount of such credits.

Let us, for a moment, consider the testimony of Mr. Dox, which was admitted under exception, and see what the principle contended for by the plaintiff in error would compel us to submit to. Mr. Dox says (on page 19): "The word 'currency' meant the bills of "the free banks of Illinois and Wisconsin. * * * * In the "Fall of 1860, and until April, 1861, the currency in use for all "business transactions at Chicago and vicinity was the bills of the "free banks of Illinois and Wisconsin.

"After the first of April, 1861, and until May 18, 1861, the cur-"rency or paper in circulation was almost wholly composed of the "issues of the free banks of Illinois. * * * * It was of fluc-tuating and uncertain value. * * * * * In November and "December, 1860, it was from five to ten per cent discount for "coin. The bills of different banks differed greatly in value "at the same time (page 20). In November, 1860, bills of nine of "the Illinois banks became so much depreciated in value, that they "were thrown out. * * * * After this, the remaining bills "that were used for currency fluctuated in value from 5 to 10 per "cent. discount for coin, until the 1st of April, 1861, when the bills "of thirty more of the Illinois banks were thrown out. * * * * "After April 1st, 1861, there were $6,500,000 of the bills of the "Illinois banks in circulation, which was almost the sole circulat-"ing medium until May 18, 1861, when this currency had depre-

" ciated so much that it was no longer used as currency. It had " then depreciated from 10 to nearly fifty per cent from coin. Some " of the banks were then but little depreciated. The bills of the " Marine Bank, the Bank of Galena, Bank of Ottowa, and two or " three others were, on the 18th of May, 1861, not so much depre- " ciated, and were worth 90 cents to par. * * * * The col- " lections made by defendant for plaintiff were all made in this " currency, or in checks upon banks payable in this currency. " This was the currency referred to in the circular of Dec. 8, 1860 " (page 21). * * * * The defendant put the funds received " on collection for plaintiff with its own funds, in the usual way.

" This currency, which was received in payment of the collec- " tions made by defendant for plaintiff, was worth from 90 to " 95 cents on the dollar at the time it was received by defendant." * * * * " The bills of all other banks than those States were " worth more than those of Illinois and Wisconsin, and always " brought a premium over others (pages 21 and 22). * * * * " During the Winter and Spring months of 1861, and while the " bills of the Illinois and Wisconsin banks were used as currency, " the defendant, as well as other banks and bankers in Chicago, " sorted the currency, reserving the best, and paying out the poor- " est."

By this testimony, we are advised that the term, "currency," from November, 1860, to May 18, 1861, had become changed in Chicago, and made to mean, such of the Illinois and Wisconsin bank bills as, from time to time, became depreciated from one hundred to fifty cents, or until thrown out entirely.

This corruption of the word, "currency," we consider a greater discount or depreciation than any discount stated by Mr. Dox, on the paper of the Illinois banks. We are told by this witness, that the meaning of the word, "currency," used in the circular of Dec. 8, 1860, was that kind of bank paper which ran down, from Novem-

ber, 1860, to April 1, 1861, from 100 cents on the dollar, to 50 or 60; and from April 1, 1861, to May 18, 1861, from 95 to 50 cents, and then ceased to exist.

We are told that the plaintiff, during the Winter and Spring months of 1861, assorted the currency, reserving the best and paying out the poorest. From this, we must understand that the currency received from the party at Ottawa, L. A. & D. M. Hulbert, who, it appears, paid on the 25th April, 1861, $1,387.29, (probably in the paper of the Bank of Ottawa, which was par, or nearly so) underwent this assorting process, the plaintiff reserving the best, and being willing to pay to the defendant in error, when demanded, the poorest—worth 40 to 60 cents.

It should be borne in mind that the circular of Dec. 8th, 1861, and the letter of Dec. 13th, 1861, could not have reference to any collections, not then in the hands of the plaintiff. The claims on which the collections were made, and now in controversy, were not sent out until April and May following. We therefore must conclude, that from this fact alone, the parties did not expect that the consent to credit the amount to the account of the defendant should extend that long. It cannot be considered as a continuing consent to an indefinite period. This consideration is strengthened by the fact, that on the 18th of May Mr. Everett asked for the collections of Hulbert & Hoyt (page 12); also, the letter of May 25th (page 10), directing to collect in specie or its equivalent. It may be said that the other letters, enclosing the notes for collection, contained direct instructions as to the several notes sent out (pages 10 & 11); all these letters directed the plaintiff in error to collect for the account of the defendant. The effect was, to supercede and revoke the consent given in letter of Dec. 13th, 1861. The plaintiff was a special agent only, receiving instructions upon each and every note sent out for collection. That authority is to govern in the absence of other instructions.

Grant, for the sake of argument, that the plaintiff had the right to collect in *currency*, we ask how it can be said that the defendant, in the city of New York, could have understood that currency in Chicago meant depreciated paper? There is no evidence that the plaintiff notified the defendant that the meaning of the word had undergone a change in Chicago; that it meant bank paper which had depreciated nearly fifty per cent., and that the party receiving it, in ordinary collections, had a right to assort and reserve the best. It is the duty of an agent to keep his principal advised of all facts and circumstances necessary for his protection, and in default, will be held responsible. (See Story on Agency, sec. 208, and cases there cited.

Devall vs. *Burbridge*, 4 Watts & Serg., 305.
Arrott vs. *Brown*, 6 Wharton, 9.

Wharton's Law Lex., 236, says the term "currency," means "bank notes or other paper money issued by authority, and which "are continually passed as, and for, coin." This, we claim, is also the commercial as well as the popular meaning of the term.

Chicago Fire & M. Ins. Co. vs. *Keiron*, 27 Ills., 506.

Proof of a special custom of banks, in a particular locality, cannot change the legal and well understood meaning of the term "*currency.*"

Marine Bank of Chicago vs. *Chandler*, 27 Ill., 548.

An agent has no right, in the absence of authority, to receive depreciated paper in payment of his principal's debt. It is not necessary to cite authorities on this point.

From the evidence in this case, we cannot resist the conclusion that the plaintiff had no authority to receive, in payment for the defendant, anything but money—specie or its equivalent. Such collections the defendant had the right to expect at the hands of the plaintiff, and such funds the plaintiff should have demanded, or returned the notes under protest.

The proof shows that the plaintiff in error did in fact receive depreciated paper—we say without authority—and did credit the amount to the account of the defendant as so much money, and did mix the funds with their general fund, and, after assorting, paid out the poorest in the daily transaction of business. Such being the proof, there can be no doubt as to the law applicable in such cases. The credit was a deposit as so much money by the defendant, upon which account the plaintiff became liable to pay the defendant the amount of such credit in money. The relation of debtor and creditor existed, and not that of principal and agent; and all risk, as to the funds received, was that of the plaintiff.

Story on Bailment, sec. 88.
Commercial Bank of Albany vs. *Hughes*, 17 Wen., 100.
Smedes vs. *Bank of Utica*, 20 John., 379–80.
Chapman vs. *White*, 2 Seldon, 417.
Munn vs. *Burch*, 25 Ills., 25.
Marine Bank of Chicago vs. *Rushmore*, 28 Ills., 463.
Matter of Franklin Bank, 1 Paige, 249.
U. S. Bank vs. *Bank of Georgia*, 10 Wheaton, 342.

Many other cases might be cited to the same effect, but we do not consider the question of the least doubt, or on which there is any conflict of authority. To change the well understood rule, applicable to the term "currency" in this country, we may be met by the authority of Chief Justice CATON, in the case referred to (27 Ill., 506). In the separate opinion in that case, Chief Justice CATON says—

"I think that it was competent to show, by parol proof, on the trial, "that the terms 'currency,' or 'Illinois currency,' to pay which, in "terms, the promises were made, had a local signification well un- "derstood by all parties, and that they did not mean gold and silver "or their equivalent. The broad and comprehensive meaning of "the word 'currency' is such as to show that it may, with pro- "priety, be used in reference to things of different values when ap- "plied to a medium of exchange of property.

"Its primary signification is passing or flowing. Something "which flows along or passes from hand to hand. When used in "reference to a circulating medium or a representative of values in "trade or commerce, it does not necessarily mean cash, but is "equally applicable to anything which is used as a circulating "medium and is generally accepted in trade as a representative of "values of property.

We quote thus much of the opinion to show the extraordinary progress made in Illinois in the science of law, and also to show the art in Chicago in the improvement of commercial exchange, and how impossible it would be to adopt such a rule in the commercial transactions in this country.

The authority cited by the Chief Justice to sustain his opinion, is the practice of the native tribes on the head waters of the Niger, where, he says, certain kinds of shells, called *kurdi*, are used as such currency or circulating medium, and about 2,500 of which represented the value of a dollar. He also informs us, that among others, strips of cotton cloth are used as currency; and among many, both are in use, as well as money. We are not advised by this opinion, where the strips of cotton cloth are used, nor are we told where both are used; but we are told, in effect, that in Chicago, it is competent to prove that currency means rags, and if a banker in Chicago promised to pay so many dollars in *currency*, a sufficient quantity of rags to make the value of the amount promised, is payment in such cases.

To adopt this principle as the rule of law, which seems to be the doctrines contended for by counsel for plaintiff in error, every town and city might have different articles for currency. Some, no doubt, would have shinplasters, others telegraph scrip, others rags and strips of cloth; the result of which would be a worse state of things than could be imagined. Having no fear of such innovation upon well settled and well understood rules of law, we will take no more time in this direction.

The next question we propose to consider is, whether the court erred in its instruction to the jury against the plaintiff in error (page 21).

It would be less difficult for us to point out the error, in the instruction given, as against the defendant in error, for the reason, we consider there is no proof to warrant a supposition that there may have been authority, either express or implied, to the plaintiff to receive depreciated paper and place the same to their credit to remain until called for. But if there had been evidence introduced, showing authority, then the plaintiff had no right to mix the funds received with the general funds of the plaintiff, and from such funds to pay out indiscriminately in the daily transactions of business, by which act it became impossible for the plaintiff to deliver the funds so received to the defendant. To make the defendant responsible for the risk of depreciation, the funds received should have been made a special deposit, so that the property therein would have been that of the defendant.

If the plaintiff, having authority to receive depreciated paper for the defendant, should mix the same with its own funds, then there was an appropriation to its own use, and by that act it became debtor to the defendant, and an action for money had and received would lie. In such case the plaintiff would be liable to the defendant for par value in coin, at the time of payment, and would, in such case, be liable for the full amount, dollar for dollar, without reference to the value in coin at the time received.

If the evidence had shown an agreement, that the loss of the currency mixed was that of the defendant in error, then, of course, the defendant would be entitled to the value at the time of demand and refusal, with interest, as the court instructed the jury. We submit, if the court please, that there cannot be any other construction given to the charge of the court.

There is one other point in the case, and one which counsel may labor with his usual skill and learning to sustain, and that is, as to to the instruction asked and refused by the court.

We can see but one point of difference between the instruction given and the one asked and refused, and that is, as to the measure of damages, the amount to be recovered in coin, on demand, and refusal to deliver the currency received by the plaintiff in error.

The instruction refused is in these words (pages 22 and 23): "*If "the jury believe, from the evidence, that the defendant was author- "ized by the plaintiff to receive, in payment of collections for the "plaintiff, the depreciated currency of Illinois, or bills issued by "the free banks of Illinois, and to place the amount to the credit of "the plaintiff, in the usual way, as stated by Mr. Dox, to remain un- "til demanded by the plaintiff, then the plaintiff is only entitled to "recover of the defendant the value in coin of such currency so "received by the defendant at the time of demand made for payment "by plaintiff, with interest from that date.*"

We submit, if the court please, that there is no evidence in the case on which to ask such instruction. The usual way, stated by Mr. Dox, was to credit the funds received on the books of the plaintiff, dollar for dollar, and place them with the funds of the bank, and after assorting and reserving the best, to pay out the poorest.

Mr. Dox says all this currency fluctuated, and was of uncertain value from November, 1860, to May 18th, 1861. In that time, much of this paper was thrown out entirely, and was not taken by any one; and it had, at least, depreciated from ten to nearly fifty per cent. After May 18th, 1861, this paper was not used as money, but was bought and sold as a commodity of the brokers, at from ten to fifty per cent discount.

Mr. Dox says that at the time of the demand, this currency was worth about 60 to 65 cents on the dollar. By this, is meant the average value of the bills which had been used as currency, or money, and in which the plaintiff's collections had been made during the Winter and Spring of 1861, and until May 18th, 1861 (page 21).

Mr. Dox says, "When the collections for the plaintiff were "made, credit was given the plaintiff, as was the usual practice, in "the books of the defendant, for the amount in dollars" (page 22).

Mr. Dox does not say that the usual practice, at that time, differed in the least from the general practice of the bank. We must conclude that it did not differ in that respect, and that when the credit was given and reported, the parties understood that the credit was for so much money, and at the risk of the plaintiff in error, and not at the risk of the defendant, as now claimed.

The testimony of Mr. Dox in relation to what the plaintiff done, and the meaning of the term "*currency*," and custom in that respect, was admitted under objections (which objections were overruled by the court, and exceptions taken by the plaintiff below. The record is not full upon this point), and is entirely incompetent; therefore, cannot now be considered by this court as proper proof in the case, on which to determine the question as to the instruction refused. The case stands as though no such evidence had been given in the case. Throw out this improper evidence, and consider the competent proofs in the case, and we repeat that there is no evidence on which to ask such instruction, and with this evidence, as all consider the rule of law, the instruction asked is without warrant.

We consider it a well settled rule of law, that if counsel ask an instruction upon which there is no proof, or no competent proof for the jury to act, it is not error in the court to refuse the instruction

asked. Counsel cannot, in this court, insist upon the consideration of evidence to sustain him which was admitted improperly on the trial, if it was excepted to at the time. The plaintiff below could have asked the court to instruct the jury that there was no proof in the case showing authority to the defendant to receive in payment of collections the depreciated currency of Illinois, or bills issued by the free banks of Illinois, and if the request had been refused by the court, it would have been error.

Whether there be *any* evidence, is a question for the court. Whether there be *sufficient* evidence, is for the jury.

Chandler vs. *Van Roeder*, 24 Howard, 226.

The most that can be said of the proof in the letter of Mr. Everett, of Dec. 13th, 1861, in answer to the circular of Dec. 8th, 1861, is, that it gave authority to collect in currency, and to credit in account at the several dates of the collections. Not a particle of authority to take depreciated Illinois currency, or bills of the free banks then being at a discount. The authority did not extend beyond currency, as understood by all and as fixed by law.

The circular stated, as a reason for not being able to remit, the scarcity of exchange. "That the supply of eastern exchange di-"minishes daily; that the amount was altogether unreliable, and "rates have advanced to 8 and 10 per cent for such funds as were "current at Chicago" (page 19).

It will be observed, that this circular does not notify the defendant that the meaning of the term "currency" had been changed in Chicago. The defendant could not have understood or expected any such thing; therefore, when the proposition came to place the collections to the credit of defendant, and the letters advising of the credit *as cash*, the defendant expected and had the right to consider the plaintiff debtor to the amount credited. But, besides all this, the letters of instruction, from four to five months after the circular, containing instructions specially in each case, which, as we

have before said, operated as further advices, and revoked the authority given December 13, 1861. The agency being special, and not general, the plaintiff had no rignt to act, except in accordance with the instructions contained in each case. When Mr. Everett, in his letter May 18, 1861 (page 12), reminded the plaintiff that the collections from Hulbert and Hoyt had not been remitted, what is the answer of the plaintiff? Not a word said, as appears from the proof. If any reply had been given, a copy of the letter could have been given in evidence, by the defendant below, on the trial. This letter was written the very day, May 18, when all but four or five banks had stooped. This letter enclosed several other collections, and must have been received two or three days after the throwing out of nearly all the bills of the Illinois banks, and when it was well known to the plaintiff that such paper was selling as a commodity at from 10 to 55 per cent. discount (page 21). If the plaintiff then relied upon any authority, as now contended, good faith would have required that the defendant in error should have been advised fully of what had been done, and the state of the funds. Not one word was said. The plaintiff was as silent as the walls of its building, and no doubt the assorting process was progressing rapidly, in order to obtain the State bonds to put in the market to realize the best price possible.

It is impossible for us to any longer keep up our courage to discuss so barren a case as the plaintiff in error has seen fit to bring into this honorable court. We, therefore, ask pardon of the court for taking so much time, and respectfully submit the case on the part of the defendant.

E. S. SMITH,

Attorney for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1863.

No. 193.

MARINE BANK OF CHICAGO, PLAINTIFF IN ERROR,

vs.

THE BROADWAY BANK, DEFENDANT IN ERROR.

SUPPLEMENT TO BRIEF AND ARGUMENT BY DEFENDANT IN ERROR.

The argument by defendant's counsel was filed, in this case, prior to a receipt of a copy of the brief and argument of counsel for plaintiff in error; we, therefore, desire to add a few suggestions, by way of supplement, to our argument already filed in this suit.

It is important that the facts in this case should be fully understood at the commencement, in order to a correct understanding of the case. It is true these parties had considerable correspondence in business matters, and, no doubt, at an earlier day than December 8th, 1860. The correspondence given in evidence, on pages 9, 10 and 11 of the record, shows a much larger amount of collections

sent out than were sued for, and, no doubt, were closed in the ordinary course of business.

Counsel for the plaintiff in error relies upon the circular of December 8th, 1860, and the letter of Mr. Everett, the cashier of the Broadway Bank, of date December 13th, 1860, to show a contract or authority in the plaintiff in error to receive in payment of collection depreciated Illinois currency. The letter and circular will be found on page 19 of the record, and at these dates it does not appear that the plaintiff in error held any paper for collection which has not been accounted for. The proofs show that the notes in question, with many others, were sent out for collection after the 8th of April, 1861, four months after the circular was issued. The several letters of instruction enclosing the paper for collection contain directions to collect for account of the defendant in error. The letter of May 25th, 1861, on page 10 of the record, contains the instructions to collect in specie, or its equivalent, or protest and return. The letter of May 18th, 1861, page 12, Mr. Everett inquires after the collection of two of the notes in question, and asks if the plaintiff had remitted for them.

The letter of December 13th, 1860, states that the plaintiff in error may credit to the account of defendant in error the collections made, until further orders, unless remittances could be made at a moderate rate.

It will be remembered that in this case there is no proof of any circular being issued after December 8th, 1860; therefore, the proof shows that the plaintiff had no authority from this circular and the letter of December 13th, 1860, after April 8th, 1861, for the reason, the letters after that time, in each case, gave instructions to the plaintiff in error to collect for account of the defendant; and in one case, directed specie to be collected, or its equivalent; and in another, demanded to know if collections in two cases had been remitted. We see, from this, that there was no authority, whatever, existing, derived from the circular and the letters of Mr. Everett of Decem-

ber 8th and 13th, 1860, and, therefore, come to the only authority contained in each case, which is a special agency, and each case to be determined by the instructions given at the time.

On page 6, of counsel's argument in this case, we think he states the contents of the circular of December 8th, 1860, a little too strong. It seems that counsel in this case has fallen into the same great error as counsel in the case of the Fulton County Bank. Counsel says that, "the principal is expressly notified that the com-"mon currency of Illinois is so depreciated that the rates of ex-"change have advanced to eight and ten per cent."

We read the circular differently, and think it does not mean any such thing, and that it was not intended to mean any such thing at the time. The word depreciated is not in the circular as referring to the currency or anything else.

The only reason given why remittances could not be made was, the want of exchange; that the supply diminished daily; and that the rates had advanced to eight and ten per cent. for such funds as are current here. This applied to Indiana, Iowa and Michigan bank notes the same as the bills of Illinois banks; so, of course, the circular could not have intended to notify the parties of the fact that any paper had depreciated in value, but simply that rates had advanced because of the supply. But this can make no difference in this case, as the proof must show that the circular can have no influence in this case, as we have before stated.

Counsel assumes that the relation of principal and agent exists in this case; and, from the authorities cited, we understand counsel to assume that the relation of general agent and principal exists; and that the rules of law in such cases, as to custom and usage, forms and law of the place, govern this case. We do not agree with counsel to that extent, and shall not follow his line of argument. We do not deny that in the first instruction, in each case, the relation of principal and special agent did exist, and that the rules of law, in such cases, are to well understood to require any further consideration on our part.

We do contend that the proofs show that the plaintiff in error, by its own act, did become debtor to the defendant in error for the several amounts collected, as stated by Mr. Dox in the several letters of advice, and that the several credits became a deposit for the amount stated, to be drawn by the defendant at any time. Such, we think, has been fully shown in our argument now on file in this case.

Counsel for plaintiff in error admits, on page seven of his argument, that the currency received upon the collections of defendant was, at the time, depreciated.

If such had been the fact in the mind of the cashier, why did he not say so in his letters on pages twelve and thirteen. He stated that defendant's account had credit, cash $1,387.29, also $670.54, also $671.00. If this paper had been of less value than par the cashier would have been very likely to have said so. If the cashier understood that the paper received was at the risk of the defendant, and it was then depreciated, and going down all the time, he would have advised the defendant of the risk; and, besides that, it would have been the duty of the plaintiff in error to have taken an account of the paper received, stating the banks and amount of each, so that the amount of the value could be arrived at definitely at the time of demand.

We submit, if the court please, that the proof does not show the first thing from which to assume any such contract between the parties.

Counsel says that they held the funds and offered to pay in like funds when demanded, and that the loss should be borne by the principal and not the agent, and that would be in accordance with every known rule of law and just dealing recognized as regulating the relation of principal and agent.

This conclusion of counsel is most extraordinary, indeed, and impossible to determine where such rules of fair dealing can be found.

The facts show that there was no general usage in Chicago as to the receipt of this depreciated currency. Some banks and bankers received some portions of it, while others would not receive others. Several parties had a list of their own, no doubt depending upon knowledge as to the condition of the banks. The prudent men took only the short list, which represented the best, while others took the long list, which represented that kind very much depreciated. This plaintiff, for some reason, received all kinds; the long list, much of it, others would not receive at all. The proof shows that this plaintiff assorted the currency received, retaining the best and paying out the poorest; and, at the same time, receiving collections for the defendant; mixing the paper, assorting it, and taking no note or memoranda of what kind received, so as to make an honest accounting; and when called upon to account—to pay over, the plaintiff in error tells the defendant, "you can have bills of Illinois banks"—then greatly depreciated—worth about sixty cents on the dollar. If this is in accordance with any known rule of law and just dealing between parties, then it is time the rule was changed. If an humble individual had been guilty of such acts, the agents of the plaintiff in error would have been prompt and loud in their denunciations, and would have charged the poor individual with fraud, and would have invoked the aid of courts to enforce the law in its most rigorous form.

Counsel complain because the court below treated the matter as money instead of depreciated bank notes, and says that Illinois currency was not money, nor could it be treated as such by agreement of parties. We shall not dispute the doctrine laid down by Senator Van Schaack, in delivering the opinion of the Court of Errors, as counsel calls it. We shall not contend that bank notes is money, nor shall we contend that current bank notes mean gold or silver, nor shall we contend that a note payable in bills of the chartered banks of Pennsylvania is a promissory note according to the law merchant. All these questions can have no bearing upon the law of the case under consideration, and, therefore, we shall take no time upon these points.

Counsel says that, common usage and custom required, at that time, banks and bankers to take and pay out the depreciated paper of Illinois banks as currency, in the ordinary transactions of business; that, according to the same usage and custom, separate accounts were kept with all depositors or customers of the banks in Chicago; that, accordingly, three distinct kinds of money or funds were recognized and kept, viz: 1. The usual Illinois currency account. 2. The specie or gold account. 3. What was known as Eastern funds, i. e. notes of banks convertible into coin or specie, or Eastern exchange—the equivalent of coin.

We must ask counsel where he finds the proof of all this machinery of account, as existing in Chicago, between December 8th, 1860, and May 18th, 1861. It is evident that counsel has gone far astray from the proof in the case, in assuming that usage and custom existed in Chicago to any extent, as indicated, so as to make it binding upon any one unless specially agreed upon.

Usage and custom to be a rule of law must be universal and ancient; such are the authorities without conflict or contradiction. The fact that Mr. Scammon and one or two others, saw fit to take the long list paper of Illinois banks, while other bankers, more discreet, refused to take more than two thirds of such list, and would not take it for any purpose, cannot make usage and custom. There is about the same plausibility in such a position, as there is in the idea that a banker can issue a circular stating that all funds received by him, although mixed, credited and used by him as he may see fit, shall be at the risk of the party for whom received, and attempt to make that declaration or decree of his a contract, binding, without any consent on the part of others or knowledge of the issuing of the circular.

There being no contract or usage which could give authority to the plaintiff in error to take in payment, depreciated paper at the risk of the defendant in error, and there being no agreement, from legal implication, arising out of the relation of the parties, giving any such authority, we might leave the questions at issue without

further remark. But as counsel has taken the position, that there was authority, either direct or by legal implication, to the plaintiff to receive depreciated paper at the defefendant's loss or risk, and has argued the case with so much ingenuity and learning, we would ask him, what would be the rules of damage in case his client had been authorized to take in payment a horse, and after receiving the horse his client had used him until he had become valueless, to a great extent, and finally he had disposed of the horse and used the proceeds, and on demand made for the horse and refusal, his client had offered to turn out old horses to the amount in value of the horse taken at the time of the demand, would his client not be liable for the amount at which he took the horse in payment?

This atttempt to make law out of the acts of a few parties, who were owners of stump-tail banks, and to justify the plaintiff in error in taking such paper, under the plea of usage and custom, we must protest against.

Counsel cites authorities to show what the law is in cases of contract to pay a sum in currency, and upon a contract to pay a certain sum in state indebtedness, and upon a contract, promissory, to pay in bank notes. We do not deny the rule of law in such cases, when the promissors avail themselves of their contracts. Counsel might as well cite authorities to show the law in cases of promises to pay in specific articles, and as well have argued the question under consideration upon the rules of law in such cases, as they would apply with as much force as those cited. The great error of counsel is so manifest, that it is difficult to follow his argument without being impressed with the belief that we are attempting to refute a shadow. The conclusions of counsel in the several points made in his argument may be said to be logical and convincing, and, no doubt, would apply, with force, to a case in which the facts would warrant the premises; but in this case, there not being any proof upon which the assumed position can stand for a moment, all the argument of counsel must fall with his incorrect premises.

Counsel, in his memoranda, says that such contracts (meaning,

no doubt, the assumed contract) cannot be recovered upon under the money counts or in an action of debt, but in covenant, or upon the special promise or contract.

We do not think it necessary to show that the action for money had and received, is the proper action in this case, as the proof shows that the plaintiff in error was bound, in law, to collect money, and did collect money, and did credit money to the account of the defendant in error. The credits were as cash, so stated in the letters; and cash means money, and does not mean a chose in action or depreciated paper.

Counsel truly says that, "the mixing of the funds is relied upon in this case by the defendant in error."

If there did exist authority to take currency, depreciated or at par, and hold it until called for, the plaintiff had no right to use it or mix it with its own, if it was to be held as a special deposit. There is no difficulty in holding special deposits, it is an every day transaction with all banks. Where funds are deposited generally and placed with the funds of the bank, and a credit given therefor, then the deposit becomes the property of the bank, and the relation of debtor and creditor from that moment exists. Such is this case; and we submit that there is no rule among bankers, nor is there any rule of law which entitles a depositor in such cases as this, or will compel him to take an aliquot part of the whole. How is it to be arrived at when the proofs show that the bankers sorted and retained the best, and kept the poorest in motion. It would soon be found that the funds on hand from which this aliquot part was to be taken would be the poorest of the whole amount received during a considerable period of time, while all the best would have been used in returning the bonds to be sold in the market; and the creditor, under such a rule, would fall far short of realizing his part, in value, while the bank would have the lion's share, in value. An aliquot part of the poorest of the long list of "stump-tail" currency, as counsel says it was called, would, in fact, give but a small part in value of what the creditor should receive.

We, therefore, say that the defendant does not claim, by the mixing of the funds, that it has the right to receive the aliquot part in value, or in number of dollars of depreciated paper, at the time of the demand. Such is not our argument, but that of the counsel for plaintiff in error.

There is another error under which counsel seems to be laboring, and that is his statement in his fifth point, that it is not pretended that the amount received, in such bills, for the defendant in error, was worth more than the notes so tendered. The proofs show that the paper, at this time received, was worth more than the notes proposed on the demand. There was no tender made of anything, as the proof shows. The plaintiff in error refused payment on demand made (page 18 of record).

Counsel, at the close of page 20 of his argument, states, as his most solemn conviction, that no precedent or case can be found attaching liability, under such circumstances, to any agency whatever, and that such an utter subversion of the plainest principles of legal and natural justice, is not warrented by a single text book, book of report, or commentary, to be found in any civilized code of jurisprudence.

This language of counsel is certainly most extraordinary in this case. To those who know the learned counsel, and his sanguine temperament, and his great zeal in whatever cause he engages, there would be no necessity for us to say one word in answer to the statement; but as this case now stands, and the arguments thus far made, we will for a moment refer to the facts, for the purpose of showing that the court below did not, by its rulings in the case, violate the plainest principles of legal and natural justice, but on the contrary, did extend to the plaintiff in error, we think, more than equal justice.

The learned counsel may have intended to be understood as referring to an agency clearly proved, and where the agent acted strictly within his instructions; but such cannot be the meaning of

the account. From that portion of the counsel's argument immediately following the statemet cited, it would seem to be admitted that the plaintiff in error was liable for the value of the paper received at the time of the collection, instead of the value of the same, or the like, at the time of the demand, as counsel says that, "In any possible interpretation which can properly be given to the "contract existing between the parties, the plaintiff in error *never* "*undertook to be bound for more than they undertook to receive:* "and that undertaking was limited to a particular kind of prop- "erty or security, called money, but which, as usually interpreted, "was no more than any other kind of notes or commodity, and in "respect to which the liability could not, in any event of failure, "extend beyond the real value of such commodity."

Now, if the court please, we grant this as we understand it, and that is this: the plaintiff undertook to collect the notes in question for the defendant in error, upon the usual instructions, which made it the duty of the agent to collect money or par funds. The agent did collect currency, which the proof shows to have been worth in coin at the time, 90 to 95 cents on the dollar; that the agent undertook to be bound for what it had received, and of course that was 90 to 95 per cent. on coin, of the amount of the notes. It cannot make any difference whatever as to what particular kind of property or security, called money, the agent saw fit to receive in payment of the notes of the defendant in error; nor can it make any difference whether it be called a commodity or currency, whether depreciated or not, the liability that moment attached to the extent of the value of the paper received by the agent, if in fact nothing greater. Such is the judgment in this case, as finally fixed by the court, of which the plaintiff in error has no just cause to complain.

By reference to the instructions given by the court to the jury (page 22 of the record), it will be found that the rule of law, as given to the jury, was exactly to the effect, as counsel admit the liability of the agent to be in that part of the argument referred. The jury were told that if they believed, from the evidence, that it was the agreement, express or implied, of the parties, that any loss by depreciation of such currency was at the plaintiff's risk, in

which case the plaintiff is only entitled to recover the value of coin of such currency at the date of demand for payment, with interest from that time.

We submit, may it please the court, that it is impossible to see how, according to law, the court could have instructed the jury more favorably for the plaintiff in error. The entire question as to whether there was an agreement, either express or implied, was left to the jury, and counsel had an opportunity to convince the jury that there was a contract, that the defendant in error was to stand the loss and risk of the paper, and failed to do so, as he must signally fail to convince this honorable court that there was any such authority or agreement. We have said all that we are required to say upon the law of the instructions in an argument now on file, and will take no further time on that part of the case.

Counsel, in his addenda, on page 22 of his argument, refers to the Illinois decisions upon several of the questions involved in this case, all of which, or nearly so, we have referred to in our brief.

We think the cases referred to fully settle the law as to the meaning of the term currency, and show that local custom or signification of the term Illinois currency, in the absence of any agreement, cannot prevail.

Counsel especially desires the attention of this court to the opinion of Chief Justice CATON, 27 Ills., p. 507; we have also referred to this opinion, and will now say that we join in the request of counsel in asking this court to examine the opinion. We do not do so for the same reason counsel seem to intimate, but for the purpose of showing the great progress made, in the minds of some, in the science of law. If two or three bankers in Chicago can make a currency out of rags, or convert depreciated paper into currency, and compel parties to take it, as money, it is important that the commercial world should understand it. If strips of cotton and Kurdi shells can be converted into a legal currency, in a country of law, where the standard of money has been fixed by law, and currency has become established as firmly as gold and silver, then we should know the fact. If a custom, among native tribes upon the head waters of the Niger, or elsewhere, existing without

law, is to be considered authority in a country of law, where money is fixed and regulated by law, then courts ought to know it. The opinion referred to would seem to establish this doctrine, and being something unheard of in any civilized country, before it is referred to as something new.

Counsel seems inclined to think that if the Illinois cases had had the circular of Dec. 8, 1860, in them, then the conclusions of the court would have been in harmony with the well-recognized principles governing all the cases of principal and agent, and the results in those cases would have been different. We beg to say that the decisions in those cases, so far as they apply, are in perfect harmony with the well recognized principles governing all the cases of principal and agent, and that if both circulars had been introduced in the cases, it could have made no difference whatever. If a contract had existed to the effect claimed by counsel, and fully proved to the extent unwarrantably claimed by counsel in this case, then there might be some ground for claiming that the loss should be upon the defendant in error.

We submit that the counsel is in great error in stating, as he does, at the close of page 23, and the beginning of page 24, of his argument, that " in the case at bar for record shows that the ap- " pellants were authorized to take depreciated currency, * * * " that there was a specific understanding and agreement between " the parties, that the appellants should receive the commodity " known as Illinois currency, a depreciated and non-redeemable " currency, in payment of the demands of the appellees, and also " to hold it until further notified or advised."

We submit, may it please the court, that such assumption on the part of counsel is entirely without proof, and unwarranted by the facts in the case, and will not here again refer to the proofs to show that counsel is in error, but will submit the case on the part of the defendant in error.

E. S. SMITH,
Att'y for Deft. in Error.

FEBRUARY 23d, 1864.